

Return Policy in Germany in the Context of EU Rules and Standards: Focussed Study by the German National Contact Point for the European Migration Network (EMN)

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Federal Office
for Migration
and Refugees



Return Policy in Germany in the Context of EU Rules and Standards

Focussed Study by the German National Contact Point for the
European Migration Network (EMN)

Working Paper 77

Paula Hoffmeyer-Zlotnik



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Summary

Return policy covers both residence law provisions, which may give rise to an obligation to return, and rules and provisions on forced and voluntary return. Autonomous or voluntary return is preferred over forced return. German return policy is influenced on the one hand by European law, such as the Return Directive (Directive 2008/115/EC), and on the other hand by the federal structure of the country. It is the Länder and their foreigners authorities which are responsible for enforcing removals and conducting voluntary returns.

The Return Directive of the European Union

The Return Directive is at the core of European return policy. It sets out that voluntary return should be preferred over forced return and obliges all Member States to issue return decisions to any third-country nationals who are staying irregularly on their territory. The Directive was implemented in Germany in 2011. Some of the most important changes in residence law triggered by this implementation are that a period for departure between seven and 30 days must be set, that certain safeguards for the return of unaccompanied minors were introduced and that any entry ban is limited to five years at most. Other key changes took place later on the back of decisions by the European Court of Justice and the Federal Court of Justice. These decisions dealt with detention on the grounds of a risk of absconding, accommodating detainees in special detention centres and a time limit on entry bans issued by the responsible authorities.

In March 2017, the European Commission released a recommendation on the implementation of the Return Directive and other EU provisions. It recommends to the Member States to use the leeway granted by the Return Directive in key provisions in such a way that only minimum standards are adhered to, for example concerning the period granted for voluntary departure or the maximum length of detention for removal purposes.

Return decision

The return decision states that a person is irregularly staying in a country and asks this person to leave the country. In Germany, return decisions are in most cases issued as removal warnings to persons who are no longer entitled to reside in Germany. In certain cases, persons who are obliged to leave the country may nevertheless lawfully stay, often at the discretion of the responsible authorities. This can be the case where leaving the country is impossible or following

the recommendation of a hardship commission. In a larger number of cases, a removal is suspended because the relevant person cannot be removed for practical or legal reasons. However, a suspension of removal ("Duldung") is not tantamount to a residence title; it only certifies that the removal is suspended.

Enforcement of the obligation to leave the country

The Federal Office for Migration and Refugees and the foreigners authorities initially grant a period for voluntary departure. During this period, the foreigners authorities may impose certain obligations on persons who are obliged to leave the country in order to ensure that they do indeed depart. For example, they may restrict their residence to a certain area or ask them to give up their travel documents to the authorities. As a last resort, they may detain these persons, provided that no other sufficient but less coercive measures can be applied effectively and that the removal will probably take place within the next three months. It is the Länder which are responsible for organising removals. However, in some cases, the Federal Police will procure passport substitutes for some countries of destination and enforce removals on behalf of the Länder. The Repatriation Support Centre ("Zentrum zur Unterstützung der Rückkehr"; ZUR), which was established in March 2017, will increasingly organise removals at the national or cross-Land level and strengthen coordination in the area of voluntary return.

Legal remedies

Appeals can be filed against both the removal warning and the underlying decision (for example the rejection of an asylum application). In most cases, an appeal against a rejection of an asylum application has a suspensive effect, unless the application was rejected as manifestly unfounded. Filing a suit against a removal warning for another reason (e.g. because a residence title has expired) does not have a suspensive effect in most Länder.

Vulnerable persons and health issues

In line with the provisions of the Return Directive, the Residence Act includes safeguards for the removal of unaccompanied minors and stricter criteria for ordering detention in case of vulnerable persons. Unaccompanied minors are not removed or detained in any of the Länder at the moment.

The legal provisions concerning health obstacles to removal were amended in 2016. In principle, only a life-threatening or serious illness which would significantly worsen upon the removal being carried out will lead to a suspension of the removal.

Entry ban

Removed or expelled persons will be subject to an entry ban. The implementation of the Return Directive introduced a limit of five years for the entry ban, granted ex officio. Before, entry bans were only limited after an application to that effect. Still, the actual length of the time limit will be fixed at the discretion of the responsible authority on a case-by-case basis.

The European Migration Network

The European Migration Network (EMN) was launched by the European Commission in 2003 on behalf of the European Council in order to satisfy the need of a regular exchange of reliable information in the field of migration and asylum at the European level. Since 2008, Council Decision 2008/381/EC forms the legal basis of the EMN and National Contact Points have been established in the EU Member States (with the exception of Denmark, which has observer status) plus Norway.

The EMN's role is to meet the information needs of European Union institutions, Member States' authorities and institutions as well as the wider public by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in these areas. The National Contact Point for Germany is located at the Federal Office for Migration and Refugees in Nuremberg. Its main task is to implement the annual work programme of the EMN. This includes the drafting of the annual policy report "Migration, Integration, Asylum" and of up to four topic specific studies, as well as answering Ad-Hoc Queries launched by other National Contact Points or the European Commission. The German National Contact Point also carries out visibility activities and networking in several forums, e.g. through the organisation of conferences or the participation in conferences in Germany and abroad. Furthermore, the National Contact Points in each country set up national networks consisting of organisations, institutions and individuals working in the field of migration and asylum.

In general, the National Contact Points do not conduct primary research but collect, analyse and present existing data. Exceptions might occur when existing data and information are not sufficient. EMN studies are elaborated in accordance with uniform specifications valid for all EU Member States plus Norway in order to achieve comparable EU-wide results. Furthermore, the EMN has produced a Glossary, which ensures the application of comparable terms and definitions in all national reports and is available on the national and international EMN websites.

Upon completion of national reports, the European Commission drafts a synthesis report with the support of a service provider. This report summarises the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present and compare selected topics in a concise

manner. The EMN Bulletin, which is published quarterly, informs about current developments in the EU and the Member States. With the work programme of 2014, the Return Expert Group (REG) was created to address issues around voluntary return, reintegration and forced return.

All EMN publications are available on the website of the European Commission Directorate-General for Migration and Home Affairs. The national studies of the German National Contact Point as well as the synthesis reports, Informs and the Glossary are also available on the national website: www.emn-germany.de

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1 Introduction

1.1 Context

Time and again, migration policy discussions have focused on return. As the number of asylum seekers jumped in 2015 and 2016, the number of rejected asylum applications rose as well – and as a result, returning those who are not entitled to stay in Germany to their countries of origin has become a political priority and a controversially discussed issue. Both the Federal Government and the European Union (EU) have intensified their return policy initiatives since 2015. The European Commission (COM) aims to raise the “effective return rate”, i.e. the share of returnees among all those who are obliged to leave the EU (COM 2017a: 2). The Federal Government has prioritised the return of those whose asylum application was rejected in Germany. In addition, the discussion focuses on irregularly staying criminals or persons who are planning crimes.

1.2 Subject and aim of this study

The legal provisions concerning voluntary¹ or autonomous return and removal are based to a considerable extent on European law, in particular the EU Return Directive (Directive 2008/115/EC (RD)²). This study analyses certain aspects of German return policy and puts them in the context of European law. In line with the EMN specifications, it follows the key provisions of the EU Return Directive and the Commission Recommendation on return policy (see Chapter 2.2.1). It aims to show how the Directive has changed the national legal provisions in Germany and to what extent the Commission’s recommendations are in line with the situation in Germany or run counter to it.

Chapter 2 will give an overview of the Return Directive and its implementation in Germany as well as of the political developments and discussions in the last few years. Chapter 3 focuses on the so-called return decision, i.e. the official measure or decision which states or imposes an obligation to leave the country (Art. 3 no. 4 RD). The following chapters will deal with the period granted for voluntary return (Chapter 4), the risk of absconding, which may be a reason to order detention (Chapter 5), the enforcement of removal orders including the legal framework for detention (Chapter 6), legal remedies against the return decision and removal (Chapter 7), the return of minors and other vulnerable persons (Chapter 8) and entry bans after a removal (Chapter 9).

1.3 Sources and terms used

Since the study mainly documents legal provisions, the relevant legal acts and related literature were the main sources. Bundestag documents and press articles were used to flesh out the discussion of individual measures. The study is largely based on publicly available sources. Some sections, however, rely on contributions by the Federal Office for Migration and Refugees, the Federal Police (BPOL) and the Repatriation Support Centre (ZUR). In addition, reports and comments by non-governmental organisations and other civil-society organisations were used.³

The terminology used in the present study is largely based on the Glossary of the EMN (EMN/COM 2014) and on the common template for the study. Terms referring specifically to the legal situation in Germany are regularly explained in the text or in footnotes (see for example the info box in Chapter 2.3).

1 The term “voluntary return” is often regarded as inappropriate, as the persons who are obliged to leave the country usually do not have any legal alternative, which means that they do not return “voluntarily” in the strict sense of this word (see SVR 2017: 7). From the government’s vantage point the return is “voluntary” because no coercive means are used and the persons may leave Germany within a given period of time; in other words, the obligation to leave the country is not immediately enforced (SVR 2017: 7). Since the term “voluntary return” is commonly used in immigration-law discussions as an opposite to the forced return of persons obliged to leave, it is used in this study as well.

2 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning irregularly staying third-country nationals

3 I wish to thank Philipp Dieterich and Jonathan Herbst for their research and editing assistance during their internship at the Research Centre of the Federal Office for Migration and Refugees.

2 European and national legal provisions concerning return

2.1 The EU Return Directive and its implementation in Germany

2.1.1 Key provisions of the Directive

The EU Return Directive is at the core of European return policy. After several years of negotiations, it was adopted in 2008 by the Council of the EU and the European Parliament (Peers 2011: 563). It contains common standards and procedures which the Member States apply when returning “illegally staying”⁴ third-country nationals⁵. The application of these standards must be in accordance with fundamental rights and the obligation to protect refugees and respect human rights (Art. 1 RD). The deadline for the national implementation of the Directive was 24 December 2010, and 24 December 2011 for certain provisions concerning legal advice and representation (Art. 20 par. 1 RD).

One of the key provisions of the Directive says that the Member States shall issue a return decision to all third-country nationals staying irregularly on their territory which obliges them to leave the relevant Member State (Art. 6 RD). In addition, the Member States shall take measures to enforce the return decision (Art. 8 RD). Voluntary return is preferred over forced returns. All persons irregularly staying in a Member State shall therefore be granted a period for voluntary departure of between seven and 30 days (Art. 7 RD). Despite the obligation to enforce return decisions, Member States may at any moment decide to grant a residence title to a third-country national staying irregularly on their territory and thus not to take, to suspend or to withdraw a return decision (Art. 6 par. 4 RD). The Directive obliges the Member States to take into account the best interests of the child, family life and the state of health of the concerned persons as well as the principle of non-refoulement (Art. 5 RD). The Return

Directive also contains provisions concerning detention for the purpose of removal (Art. 15 et seq. RD), procedural safeguards and legal remedies against the return decision and against detention (Art. 12 et seq. RD) and provisions concerning entry bans (Art. 11 RD). Even though the Return Directive aims to create a common return policy within the EU (Hailbronner 2017: 36), it sets only minimum standards in many areas or gives the Member States considerable leeway in applying certain provisions (Augustin 2016: 138). It states explicitly that the Member States may adopt more favourable provisions, provided that these provisions are compatible with the Directive (Art. 4 par. 3 RD).

At the time of its adoption, the Directive met with – sometimes considerable – criticism from individual legal scholars, civil-society organisations and the UN High Commissioner for Refugees (UNHCR; Peers 2011: 575; see also ECRE 2009). The main points of criticism were that the Directive foresees detention of up to 18 months and the introduction of an EU-wide entry ban of up to five years (Cherti/Szilard 2013: 4). In addition, UNHCR argued that the safeguards and rights for unaccompanied minors and vulnerable persons were insufficient (UNHCR 2008). An evaluation of the application of the Directive in 2013 showed that its implementation had raised the standard of protection in some Member States (COM 2013).⁶

2.1.2 Implementation of the Return Directive in Germany

The Member States were obliged to implement the Return Directive by 24 December 2010. On 16 December 2010, the Federal Ministry of the Interior (BMI) issued guidelines on the direct application of the Directive from 24 December 2010 (Schneider 2012: 65). The Directive was actually implemented with the “Act on the Implementation of European Union Residence Directives and the Adaptation of National Laws to the EU Visa Code” of 22 November 2011.⁷

4 Pursuant to the definition of the Directive, “illegally staying” third-country nationals are those who do not fulfil, or no longer fulfil the conditions for entry, stay or residence in a Member State (Art. 3 no. 2 RD).

5 Pursuant to Art. 2 of the Schengen Borders Code, “third-country national” refers to any person who is not a Union citizen within the meaning of Article 17 par. 1 of the Treaty and who is not covered by Art. 2 no. 5 of the Schengen Borders Code, i.e. who is not a “person enjoying the Community right of free movement” (Regulation (EC) no 562/2006). According to this definition, and in this study, citizens of EU Member States, Iceland, Norway, Liechtenstein and Switzerland are not regarded as third-country nationals (see also EMN/COM 2014: 283).

6 For example, some Member States had not set a maximum time limit on detention or did not grant a period for voluntary return before the implementation of the Directive.

7 BGBl. Part I no. 59, p. 2258.

Exemption of certain groups of persons from the application of the Return Directive

In principle, the Return Directive applies to all third-country nationals staying irregularly on the territory of a Member State (Art. 2 par. 1 RD). All persons who do not (or no longer) fulfil the conditions of entry or residence of the respective Member State are considered to be staying irregularly. However, the Member States may exempt certain groups of persons from the Return Directive. This may apply to persons who are apprehended or intercepted in connection with the irregular crossing of an external Schengen border or are subject to a refusal of entry in accordance with Art. 13 of the Schengen Borders Code and who do not subsequently obtain an authorisation or a right to stay in the Member State (e.g. by filing an asylum application; Art. 2 letter a RD). In addition, the Member States may not apply the Directive to persons who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction or who are the subject of an extradition procedure (Art. 2 letter b RD).

Germany has availed itself of the first option. In the case of an irregular border crossing, the provisions on removal following an unauthorised entry (Section 57 of the Residence Act) and refusal of entry (Section 15 of the Residence Act; see Chapter 2.3) apply, whereas the provisions of the Return Directive are not applicable (Hailbronner 2017: 259; Hörich 2015: 62). If the so-called Dublin Regulation (Regulation (EU) 604/2013)⁸ applies, the Return Directive will not apply either (Hörich 2015: 67).⁹ While Germany has not fully excluded the application of the Directive in the case of criminal sanctions, the government's reasoning for the Act on the Implementation of the Directive refers to this option with regard to specific provisions (Deutscher Bundestag 2011: 21; 24).¹⁰

⁸ Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁹ In this case, the provisions of Regulation (EU) no. 604/2013 apply. However, pursuant to German law, transfers under this Regulation take place according to the provisions for ending a foreigner's stay in Germany (Sections 58 et seq. of the Residence Act), i.e. indirectly pursuant to the provisions of the Return Directive, unless the person is not removed to the responsible Member State directly at the border (Section 57 subs. 2 of the Residence Act; Hörich 2015: 69). Transfers under the Dublin Regulation do not come within the scope of this study.

¹⁰ Examples are removal from detention pursuant to Section 59 subs. 5 of the Residence Act (Hailbronner 2017: 373) or the length of the entry ban, which may exceed five years in the case of a criminal conviction (Section 11 subs. 3 second sentence of the Residence Act). The Return Directive itself foresees exemptions in these two cases if the deportee poses a (serious) risk to public order, public security or national security (see Hörich 2015: 63).

Act on the implementation of the Return Directive

While the law on the termination of residence in Germany was not fundamentally altered by the implementation, some areas saw changes. These included:

- the obligation to issue a written return decision to all third-country nationals who are obliged to leave the country (see Chapter 3),
- the obligation to fix a period between seven and 30 days for voluntary returns. Before, there were no provisions concerning the length of such a period, nor were the authorities obliged to set such a period for voluntary returns at all (see Chapter 4),
- legal provisions concerning the conditions of detention (Section 62 of the Residence Act) (see Chapter 6),
- the obligation for the responsible authorities to make sure ahead of a removal that unaccompanied minors are handed over to a family member, a person possessing the right of care and custody or a suitable reception centre in the country of destination (see Chapter 8.2),
- a time limit of five years for an entry ban, which was however set only upon application (see Chapter 9).

Legal amendments after the act on the implementation of the directive

Subsequently, several other amendments were made on the grounds of the Return Directive. They became necessary due to decisions by the European Court of Justice or the Federal Court of Justice. Such amendments are as follows:

- the obligation to limit entry bans ex officio instead of limiting them only upon application (judgment of the European Court of Justice of 19 September 2013¹¹, see Chapter 9),
- the obligation to set legal criteria for the assumption that there is a risk of absconding. A risk of absconding is one reason to apply for detention (decision by the Federal Court of Justice of 26 June 2014¹², see Chapter 5),
- the obligation to accommodate detainees in specialised detention facilities, even if such specialised facilities are not available in the respective Land (judgment of the European Court of Justice of 17 July 2014¹³, see Chapter 6).

¹¹ European Court of Justice, case C-297/12

¹² Federal Court of Justice, decision of 26 June 2014, V ZB 31/14. While the judgment referred to detention in the framework of the Dublin Regulation, it is also relevant for detention for removal purposes under the provisions of the Return Directive. The Return Directive contains the same criteria for the assumption that there is a risk of absconding as the Dublin Regulation (Art. 3 par. 7 RD; Art. 2 letter n of the Regulation (EU) no. 604/2013).

¹³ European Court of Justice cases C-473/13, C-514/13 and C 474/13.

2.2 Developments and recent political discussions in the area of European and German return policy since 2015

2.2.1 Action plans and recommendation of the European Commission

On 17 May 2015, the European Commission adopted the European Agenda on Migration, which contains the EU's key goals in the area of migration policy and concrete measures to reach these goals. In addition, the EU Action Plan on Return was adopted on 9 September 2015, which contains "concrete actions to improve the efficiency of the European Union's return system" (COM 2017a: 2). Together with the Action Plan, the Commission also published a Return Handbook to support the authorities of the Member States regarding the enforcement of removals. The Action Plan foresaw increased support for voluntary returns, a consequent implementation of the Return Directive in the Member States (for example by including the threat of a Treaty infringement procedure if the Directive was not implemented) and an improved exchange of information and cooperation with the countries of origin and transit (COM 2015). According to the European Commission, "most of these actions are ongoing or have been implemented" (COM 2017a: 2). However, "the overall impact on the return track record across the European Union remained limited", which is why a renewed Action Plan with a number of return measures was adopted on 2 March 2017. At the same time the European Commission adopted a recommendation to the Member States on "making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council" (COM 2017b: 1). It recommends to the Member States to use the leeway granted by the Return Directive in such a way that only minimum standards are guaranteed in key areas. Amongst others, the recommendations refer to:

- exempting certain groups of persons from the Directive (see Chapter 2.1.2),
- issuing return decisions (see Chapter 3.1),
- the period for voluntary returns (see Chapter 4.1),
- determining a risk of absconding (see Chapter 5.1),
- sanctions against persons who are obliged to leave the country (see Chapter 6.2.1),
- the enforcement of detention (see Chapter 6.3.1),
- the removal of minors (see Chapter 8.2.1),
- health obstacles to removal (see Chapter 8.4.1).

The Commission Recommendation has been criticised by civil-society organisations in particular. On 3 March 2017, 90 non-governmental organisations published a joint opinion stating that the Commission's interpretation of the Return Directive ate away at human-rights standards during the return procedure and motivated the Member States to reduce

their standards. The recommendations concerning detention met with particular criticism (ECRE 2017).

This study will take the recommendations into account in order to put the situation in Germany in a European context. However, it does not purport to analyse the implementation or application of the recommendations.

2.2.2 Legal amendments and political initiatives in the field of return in Germany

Discussions about migration policy were shaped by the jump in the number of asylum seekers in 2015 (EMN/BAMF 2016a). In 2015 and 2016, several amendments to asylum law affected return policy, too.¹⁴ Since 2016 in particular, return policy has become a priority in German migration policy and an important issue in the related discussions (see EMN/BAMF 2017: 19; Deutscher Bundestag 2017). The most important legal amendments in the area of return policy were as follows:

- the introduction of custody to secure departure under the 'Act Redefining the Right to Remain and the Termination of Residence', which entered into force on 1 August 2015 (see Chapter 6.3.2),
- the prohibition of informing the person concerned of the removal date (Section 59 subs. 1 eighth sentence of the Residence Act) under the Act on the Acceleration of Asylum Procedures (Asylum Package I), which entered into force on 21 October 2015,
- the introduction of a legal basis for special reception centres under the 'Act on the Introduction of Fast-Track Asylum Procedures' (Asylum Package II¹⁵), which entered into force on 17 March 2016. Under certain conditions, asylum seekers may be obliged to remain at these reception centres until their asylum procedure is completed or, in case of a rejection of their asylum application, until their return (see Chapter 5.2.2),
- amended provisions concerning a suspension of removal for health reasons (Section 60 subs. 7 of the Residence Act; see Chapter 8.4.2),
- the 'Act to Improve the Enforcement of the Obligation to Leave the Country'¹⁶, which entered into force on 29 July. It lengthened the period of custody to secure departure to a maximum of 10 days and extended the length of detention (see Chapter 6.3.2), extended the monitoring of persons under residence law provisions and tightened the residence requirement for those who are enforceably required to leave Germany. Furthermore, the prohibition of informing the person concerned of the removal

14 For a detailed overview of the legal amendments in 2015 and 2016 see EMN/BAMF 2016 and EMN/BAMF 2017.

15 BGBl. 2016 Part I No. 12 p. 390.

16 BGBl. 2017 Part I No. 52 p. 2780.

date was extended to persons whose removal has been suspended for over a year (see Chapters 5.2.2 and 6.2.2).

Beyond these legal amendments, the Federal Government and the Länder took administrative measures to coordinate return policy and strengthen assisted return.

In March 2017, the Repatriation Support Centre (ZUR) started work. It aims at improving operative coordination of the Federal and Land authorities in the area of voluntary and forced return. The ZUR supports the Länder in organising collective removals or procuring passport substitutes for return purposes (Deutscher Bundestag 2017a: 3) and deepens coordination in the area of voluntary return. The Centre is led by the Federal Ministry of the Interior and builds upon existing structures, such as the Federation-Länder Coordination Agency for Integrated Return Management and its return working group and the passport substitute procurement office of the Federal Police. The offices of the coordination agency and the return working group now come under the remit of the Repatriation Support Centre (IMK 2017: 8).

At the Federal level, several new initiatives in the area of voluntary return were launched in 2017, for example the “Starthilfe Plus” programme to promote returns (see Chapter 2.3), the reintegration programme “Returning to New Opportunities” (“Perspektive Heimat”) run by the Federal Ministry of the Interior and the Federal Ministry for Economic Cooperation and Development, a new online information portal on return, which the Federal Office for Migration and Refugees has designed in cooperation with the International Organisation for Migration (IOM)¹⁷ and a return hotline (EMN/BAMF 2017: 60). In addition, since the end of June all asylum seekers are being informed about assisted voluntary return and reintegration options when they file their application.

2.2.3 Political and public discussion in Germany

Forced return has been at the centre of the German migration policy debate since 2016. The discussion focuses in particular on the treatment of persons who might endanger public security, for example by planning or conducting terrorist attacks. The issue came to the fore when a terrorist killed twelve people and injured another 48 in an attack on a Christmas market in Berlin on 19 December 2016. Several attempts to remove the attacker had failed, which was one reason, according to Minister of the Interior Thomas de Maizière, that the Act to Improve the Enforcement of the Obligation to Leave the Country was drafted (EMN/BAMF 2017: 21). It entered into force on 29 July 2017.

Removals to Afghanistan are another key issue. In October 2016, both the EU and the Federal Government signed agreements with Afghanistan to facilitate both forced and voluntary returns. On the grounds of these agreements, several collective removal operations to Afghanistan have taken place since December 2016 (EMN/BAMF 2017: 62). Both the parliamentary opposition and civil-society organisations criticised these removals on the grounds that the security situation in Afghanistan was inadequate and that the threat of removal was a considerable psychological burden for those affected and caused more of them to abscond (Bayerischer Rundfunk 2017; Klöckner 2017; Mediendienst Integration 2017). After an attack in Kabul, the Afghan capital, hit the building of the German embassy on 31 May 2017, the Federal Government and the Länder announced that they would review their assessment of the security situation in Afghanistan and largely suspend removals until they had done so (Bundesregierung 2017). The renewed assessment was finalised in August 2017. It came to the conclusion that the security situation for the civil population has not changed considerably (BMI 2017a, see also PRO ASYL 2017). Especially “criminals, persons who may endanger public security and persons who persistently refuse to cooperate” shall still be removed after examining their individual cases, according to Minister of the Interior de Maizière.

And finally, the public discussion often focuses on the situation of young people who are on the one hand obliged to leave the country and on the other attending school or vocational training measures in Germany (see Giaramita 2017). The foreigners authorities may choose different approaches in applying the provisions concerning a suspension of removal during school or vocational training. Civil-society organisations as well as chambers of industry and commerce and enterprises which train new staff have criticised the resultant uncertainty for both the apprentices and the enterprises which train them (Öchsner 2017).

2.3 Development of voluntary and forced returns since 2012

As is evident from the overview of the number of third-country nationals who are required to leave Germany as of 31 December of each year in table 1, removal was suspended for a majority at any of the relevant dates. As of 30 December 2016, 96,731 third-country nationals were registered as required to leave Germany because their asylum application had been rejected (BMI 2017a: 2). As of that date, this group represented a bit less than half of all third-country nationals who were required to leave Germany.

17 www.returningfromgermany.de (25 July 2017).

Table 1: Number of third-country nationals* obliged to leave Germany on certain dates

Date	31.12.2012	31.12.2013	31.12.2014	31.12.2015	31.12.2016	30.06.2017
Number of persons who are obliged to leave the country	112,395	123,025	144,312	193,413	196,055	215,346
Number of persons whose removal was suspended	84,729	93,436	112,118	154,167	151,854	158,528

* In the framework of this study, the term “third-country nationals” applies to all persons who are not citizens of an EU Member State or of Iceland, Liechtenstein, Norway or Switzerland (see EMN/COM 2014: 283).

Source: Central Register of Foreigners

Table 2 shows the number of removals, removals following an unauthorised entry and refusals of entry of third-country nationals from 2012 until the first half of 2017. The figures cannot be directly compared with the number of persons required to leave the country, as the latter represents the situation on a given date, whereas the figures on removals and assisted returns (see below) are accumulated figures for the year as a whole. The surge in refusals of entry in 2015

and 2016 is linked to border controls, especially at the land border with Austria, which were reintroduced on 13 September 2015 (see EMN/BAMF 2017: 32). Between 2012 and 2014, refusals of entry only took place at ports of entry at sea or airports, whereas refusals of entry at land borders have accounted for the majority of refusals of entry since 2015 (cf. Deutscher Bundestag 2013, 2014a, 2015a, 2016a, 2017b, 2017c).

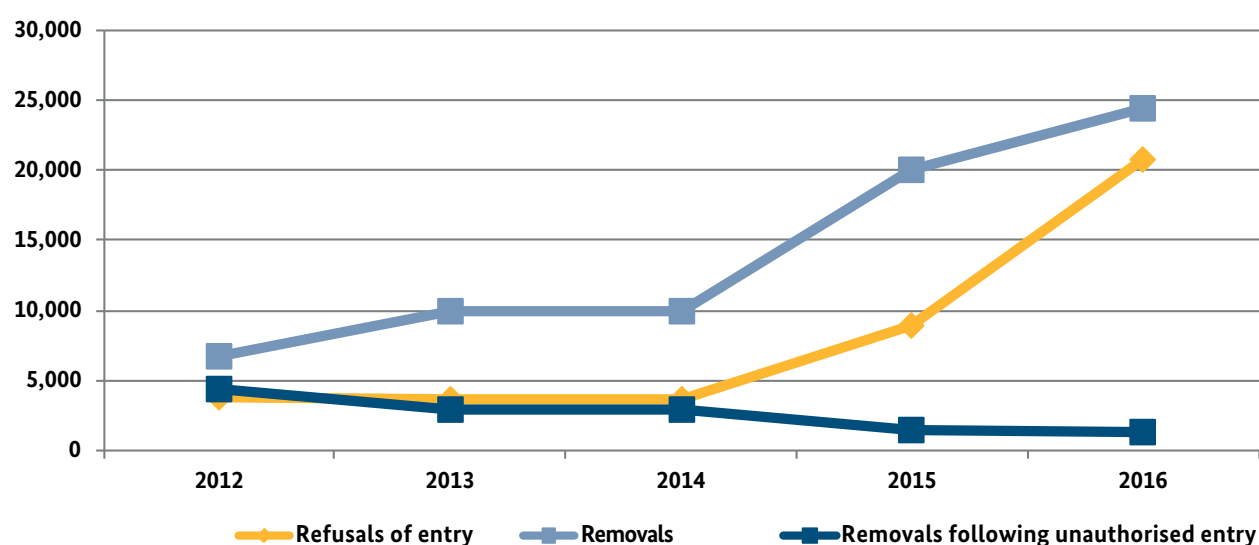
Table 2: Refusals of entry, removals, and removals following unauthorised entry of third country nationals 2012-2017 (first half)*

Year	2012	2013	2014	2015	2016	- Jun 2017
Refusals of entry	3,822	3,603	3,609	8,885	20,826	5,906
Removals	6,770	9,885	9,916**	19,987	24,350	11,988
Removals following unauthorised entry	4,328	2,905	2,928	1,439	1,253	901

* The figures shown here differ from the figures on removals as mentioned e.g. by the EMN Annual Policy Report (EMN/BAMF 2017) or in information published by the Federal Government (Bundesregierung o. J.). This is due to the fact that this study only considers third-country nationals, whereas other publications usually present the overall number of removals, removals following unauthorised entry or refusals of entry.

** Includes 26 removals by sea for which no information is available on the nationality of the persons concerned (cf. Deutscher Bundestag 2015a: 9). They are counted as third-country nationals.

Source: Deutscher Bundestag 2013, 2014a, 2015a, 2016a, 2017b, 2017c, own calculation.

Figure 1: Refusals of entry, removals and removals following unauthorised entry of third country nationals

Source: Deutscher Bundestag 2013, 2014a, 2015a, 2016a, 2017b, 2017c, own calculation.

Table 3: Returns supported by REAG/GARP 2012-2017 (first half)

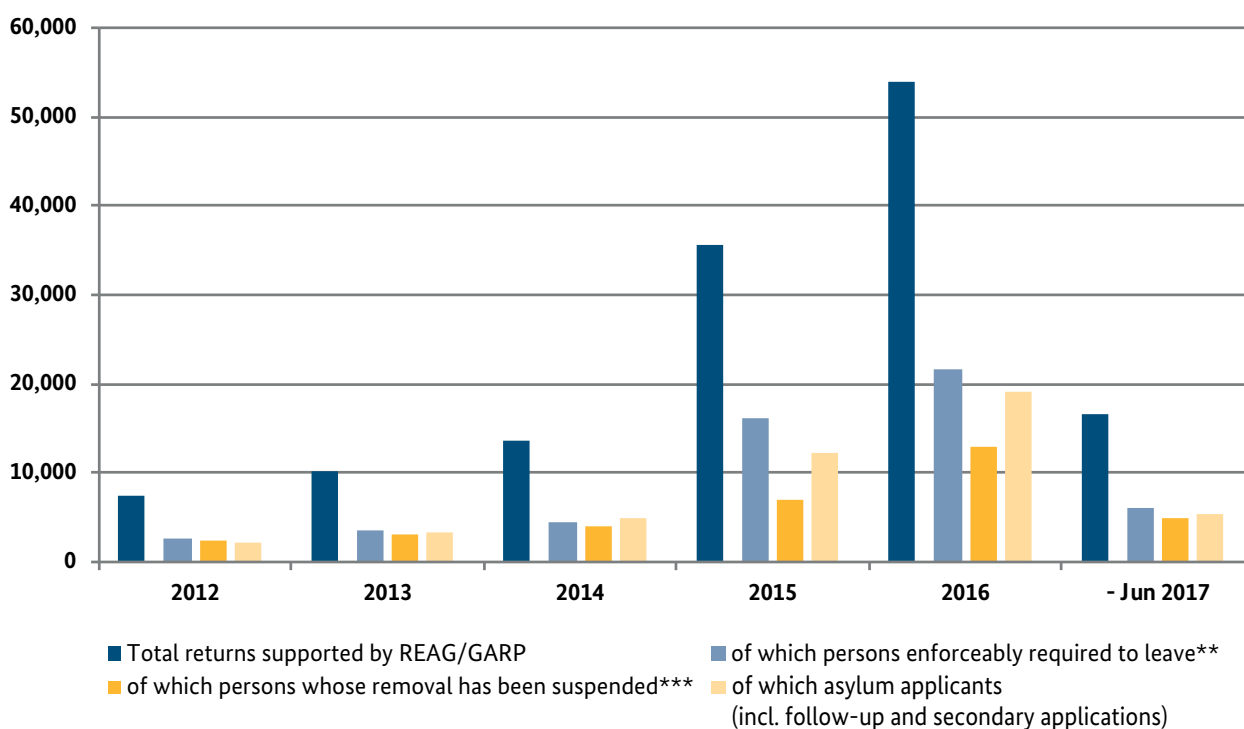
Year	2012	2013	2014	2015	2016	- Jun 2017*
Total returns supported by REAG/GARP	7,546	10,251	13,574	35,514	54,006	16,645
of which persons enforceably required to leave**	2,622	3,591	4,531	16,092	21,698	6,024
of which persons whose removal has been suspended***	2,451	3,185	3,984	7,043	13,040	4,962
of which asylum applicants (incl. subsequent and secondary applications)	2,217	3,318	4,928	12,265	19,012	5,451

* Preliminary figures. Persons supported by StarthilfePlus are included in the figures for the first half of 2017, as all persons eligible for Start-hilfePlus also receive benefits through REAG/GARP.

** A person counts as enforceably required to leave according to the REAG/GARP statistics even if the removal warning is no longer or not yet enforceable.

*** Persons whose removal has been suspended are enforceably required to leave the country. However, they are counted separately as they enjoy a (temporary) tolerated status.

Source: IOM

Figure 2: Returns supported by REAG/GARP by legal status

Source: IOM.

Table 3 shows the number of persons returned with support of the REAG/GARP¹⁸ programme between 2012 and the first half of 2017. These numbers do not cover all assisted returns, as support of other programmes (for example at the Land level) is not included.¹⁹ At the same time, persons can

be granted support via the REAG/GARP programme while being entitled to reside in Germany. From 2012-2016, around two thirds of returnees were enforceably obliged to leave Germany or their removal had been suspended. That means that around a third left Germany with support of the REAG/GARP programme while having a right to reside in Germany – mostly because they had filed an asylum application.

18 REAG: Reintegration and Emigration Program for Asylum Seekers in Germany; GARP: Government Assisted Repatriation Program.

19 Several other assistance programmes are financed by a mix of REAG/GARP funds and additional Länder funds and are thus included in the REAG/GARP statistics; however, there are also numerous programmes for persons who are not supported via

REAG/GARP (Grote 2015: 21). For the years before 2015, it can be assumed that a high four-figure number of persons has returned with support by the Länder or municipalities.

The programme StarthilfePlus has created additional incentives for an earlier return: Since February 2017, persons can get additional financial support if they decide to return during the asylum procedure or within the period for voluntary departure. If they return during the asylum procedure, the additional support amounts to 1,200 euros; after the decision on the asylum application it is 800 euros. Through a transitional arrangement, persons who are obliged to leave the country or who have filed a subsequent or secondary

application can also get financial support if they were registered before 1 February 2017. The transitory arrangement runs until 31 December 2017. Between February 2017 and July 2017, more than 5,000 persons have received support with StarthilfePlus, of whom more than 70 % were supported with the transitory arrangement.

Autonomous, unassisted voluntary returns impossible to capture in the statistics (see Chapter 4.2.3).

Infobox: Assisted voluntary returns under the REAG/GARP and StarthilfePlus programmes

REAG/GARP is a joint programme of the Federal and Land governments to promote voluntary returns. The International Organisation for Migration (IOM) has been tasked with running the programme. It is the most important programme for the promotion of voluntary return. In addition to paying travel costs, it offers travel aid (REAG) and, if applicable, start-up aid for reintegration (GARP), with the amount of the assistance depending on the country of origin. The persons eligible for support are recognised refugees, persons with another right to stay on humanitarian grounds and persons entitled to receive benefits under the Act on Benefits for Asylum Applicants

(these are mostly asylum applicants and persons whose removal has been suspended; IOM 2017).

Since February 2017, the REAG/GARP programme has been supplemented by the **StarthilfePlus** (“Start-up cash Plus”) programme, which provides additional financial support for voluntary returns during the asylum procedure and the period granted for voluntary returns (see above; BAMF 2017). In addition to REAG/GARP and StarthilfePlus, there are numerous return programmes run by the Länder and local organisations (see Grote 2015).

Infobox: Forced Return

Return is a general term which covers all measures to end or prevent a stay in a country. The term is mainly used in the context of EU law (see Art. 3 par. 3 RD; see also SVR 2017: 10).

Removal or deportation (Section 58 of the Residence Act) means that a foreigner’s obligation to leave the country is enforced using coercive measures. It requires that the obligation to leave is enforceable and that the foreigner has not voluntarily left the country during the period granted for this purpose or that supervision of the departure appears necessary.

Removal following unauthorised entry (Section 57 of the Residence Act) is a measure which immediately ends the stay of a foreigner who is intercepted in conjunction with an unlawful entry near the border (SVR 2017: 10). Such a removal can only take place if the person concerned has not applied for asylum and if removal is not prohibited. If the person concerned entered Germany irregularly from another EU Member State, s/he will be removed to that state. In contrast to a ‘regular’ removal, a removal following an unauthorised entry does not require a warning or the granting of a period for voluntary return (Hailbronner

2017: 359); in addition, legal remedies usually do not have a suspensive effect (see Chapter 7.2.2).

Refusal of entry (Section 15 of the Residence Act) takes place at the border and thus does not end, but prevent a stay in Germany. Persons can be refused entry at the border if they enter the country without authorisation or if they do not comply with the requirements of entry.

Expulsion (Sections 53-56 of the Residence Act) is not an actual procedure, but an administrative act to terminate the lawfulness of the foreigner’s residence in Germany and create an obligation to leave the country. Foreigners whose stay endangers public safety and law and order or the interests of the Federal Republic of Germany can be expelled.

A removal order pursuant to Section 58a of the Residence Act contains both an expulsion order and the relevant order of enforcement. It can serve as grounds for detention if the removal cannot be enforced immediately (Section 62 subs. 3 no. 1a of the Residence Act; Kreienbrink 2007: 63). This is an exceptional provision for particularly dangerous situations (Hailbronner 2017: 392).

3 Return decision

3.1 Provisions set out in the Return Directive and the Commission Recommendation

The Return Directive obliges all Member States to issue, in principle, a return decision to any third-country national staying irregularly on their territory (Art. 6 par. 1 RD). A return decision is an administrative or judicial decision or act which states or declares the stay of a third-country national to be illegal and imposes or states an obligation to return (Art. 3 par. 4 RD). It shall be issued in writing and give reasons in fact and in law (Art. 12 par. 1 RD). Upon request, the Member States shall provide a written or oral translation of the main elements of the decision (Art. 12 par. 2 RD). However, Member States may refrain from issuing a return decision if the third-country national concerned is taken back by another Member State under a bilateral agreement or arrangement.²⁰ Moreover, they are not obliged to issue a return decision if they grant a residence permit to the third-country national concerned for humanitarian or other reasons or in order to avoid hardship (Art. 6 par. 4 RD).

In its Recommendation on return policy, the Commission calls upon the Member States to make use of the derogation provided for under the Return Directive in the case of illegal border-crossing or refusals of entry so that no obligation to issue a return decision arises. Germany already uses this option (see Chapter 2.1.2). In addition, the Commission recommends that Member States should take measures to make it easier for the competent authorities to locate third-country nationals to whom a return decision is to be issued. Return decisions are to be issued regardless of whether the third-country national holds an identity or travel document. Moreover, return decisions are to be issued as a matter of principle jointly with a decision terminating the legal stay in the country, have unlimited duration and explicitly state that the obligation to leave the country is met only if the third-country national enters a third country (i.e. not another EU or Schengen Member State; COM 2017b: recommendations 5-8).

3.2 Implementation in Germany

3.2.1 Responsibility for issuing return decisions

Removal warning and removal order after an unsuccessful asylum application

If an asylum application is rejected during the asylum procedure, the obligation to leave Germany arises from the notice of rejection issued by the Federal Office for Migration and Refugees. This notice of rejection also includes a removal warning, which is equivalent to a return decision under European law (Section 34 subs. 1 of the Asylum Act). The Federal Office for Migration and Refugees shall also order a removal if the person concerned has to travel to another EU Member State who is responsible for the asylum procedure or if asylum applicants are to be returned to a safe third country (Section 34a subs. 1 first sentence of the Asylum Act).

Expiry, withdrawal or revocation of a residence title

If a third-country national is obliged to leave the country because his or her residence title has expired, been withdrawn or was lost, the competent foreigners authority shall issue the return decision (see Section 50 subs. 1 of the Residence Act; Section 59 subs. 1 first sentence of the Residence Act in conjunction with Section 71 subs. 1 of the Residence Act; EMN/BAMF 2016b: 13). In these cases the foreigners authorities shall issue a document requesting the person concerned to leave the country (Hailbronner 2017: 316).

Expulsion

If a person is expelled, the obligation to leave Germany arises from the expulsion order (Section 53 subs. 1 of the Residence Act). This expulsion order is equivalent to a return decision within the meaning of the Return Directive (Basse et al. 2011: 364). The expulsion order is the administrative act which creates the obligation to leave, but the actual departure is enforced later (e.g. through a removal). The foreigners authorities are responsible for ordering an expulsion (Marx 2017: 739).

Removal order

In case of a removal order pursuant to Section 58a of the Residence Act the obligation to leave the Federal territory and the return decision come into existence at the same time (see Chapter 2.3). The supreme Land authorities are

²⁰ This agreement or arrangement must have existed on the date of the entry into force of the Return Directive.

competent and responsible for the issuance of removal orders (Section 58 subs. 1 first sentence of the Residence Act). The Federal Ministry of the Interior may step in if a special interest on the part of the Federation applies (Section 58 subs. 2 first sentence of the Residence Act).

3.2.2 Form and content of a return decision

The return decision always includes the information that a person is obliged to leave the country and the request to leave Germany either immediately or within the given period for voluntary return. It must be issued in writing and include a statement of reasons. In addition, it must contain information about available legal remedies. Upon request, the decision shall be translated (Section 77 of the Residence Act). The implementation of the Return Directive extended these formal requirements to all acts which lead to an obligation to leave the country or threaten the person concerned with removal to enforce this obligation. Before, the foreigners authorities were not required to issue a removal warning in writing, but were encouraged to do so if the obligation to leave the country arose by law, for example because a residence title expired (Schneider 2012: 65).²¹

The removal warning shall specify the state to which the person concerned is to be removed, if necessary, and inform that s/he may also be removed to another state which s/he is permitted to enter or which is obliged to admit him or her (Section 59 subs. 2 of the Residence Act). The person concerned is asked to leave the Federal Republic of Germany within the period allotted for voluntary departure. However, contrary to the Commission Recommendation, the return decision does not include the information that the person concerned has to leave the Schengen area or the EU to comply with the obligation to leave (see Flüchtlingsrat Thüringen e.V. 2016: 2).

3.2.3 Period of validity of return decisions

In principle, there is no time limit on the validity of return decisions. A removal warning will be issued even if the removal will not actually be carried out (Section 59 subs. 3 first sentence of the Residence Act) or if it is suspended (see Chapter 3.2.6). A removal warning becomes irrelevant if the person concerned enters a non-EU Member State or a non-Schengen state (Marx 2017: 799), if s/he files an asylum application after having received the removal warning and is therefore granted a permission to remain on these grounds (Section 55 of the Asylum Act) or if, after a subsequent application, a second asylum procedure is conducted (see Section 71 subs. 5 first sentence of the Asylum Act). If the

obligation to leave the Federal territory is lifted, for example by a court, the return decision shall no longer apply either. In addition, persons who are obliged to leave the country may obtain a residence title under certain circumstances, which will make the return decision irrelevant (see Chapter 3.2.6).

3.2.4 Taking into account obstacles to removal when issuing return decisions

Examination before the issuance of a removal warning

In principle, a removal warning may only be issued if the removal as such is permitted (Marx 2017: 799). A removal must be suspended if it is impossible in fact or in law (Section 60a subs. 2 first sentence of the Residence Act). The Federal Office for Migration and Refugees and the competent foreigners authority shall, respectively, examine whether there are any obstacles to a removal. The Federal Office for Migration and Refugees examines any obstacles to removal arising from the situation in the country of destination (Schneider 2012: 30; Section 24 subs. 2 of the Asylum Act). This includes checking whether a removal to that country would violate the non-refoulement clause of the Geneva Convention relating to the Status of Refugees (Section 60 subs. 1 first sentence of the Residence Act) or the rights under the European Convention on Human Rights (Section 60 subs. 5 of the Residence Act). The foreigners authorities examine obstacles which might hamper the enforcement of the removal (EMN/BAMF 2016b: 16). One such obstacle is if the person concerned is too ill to travel. If there is no such obstacle, the removal may be enforced. If a person who is obliged to leave the Federal territory has not undergone an asylum procedure, the Federal Office for Migration and Refugees must be involved in the removal procedure by the competent authorities in order to decide whether a removal to the intended country of destination is prohibited pursuant to Section 60 subs. 5 or 7 of the Residence Act (Section 72 subs. 2 of the Residence Act). In case of such removal bans, the foreigners authority shall issue a residence permit or suspend the removal (Sections 25 subs. 5 and 60 subs. 5 or 7 of the Residence Act; Grote 2014: 28 et seq.). If persons staying irregularly apply for asylum, they shall be referred to the competent or nearest reception centre (Section 19 subs. 1 of the Asylum Act). The Federal Office for Migration and Refugees shall then examine the asylum application and possible removal bans.

Examination after the issuance of a removal warning

If circumstances change after the removal warning came into effect, the foreigners authority may take into account these changed circumstances (59.0.4 of the General Administrative Regulation to the Residence Act). If the period for filing an appeal has passed or if an appeal has failed, the removal warning becomes non-appealable. In that case, the foreigners authority needs to take into account only those

²¹ A written removal warning was, however, strongly recommended by law before the implementation of the Return Directive and was indeed issued in most cases.

circumstances which came into being after the removal warning became non-appealable. If the person concerned informs the authority of circumstances which might be an obstacle to removal, but came into being before the removal warning's becoming non-appealable, the foreigners authority may ignore these circumstances (Section 59 subs. 4 first sentence of the Residence Act). Such circumstances may be considered in court, if at all (see Chapter 7; Section 59 subs. 4 second sentence of the Residence Act).

If the removal is suspended, the circumstances which prevent a removal are regularly reviewed as the suspension is only granted for a limited period of time. Towards the expiry of this period, the authorities shall decide on the extension of the suspension and examine whether the obstacle to removal still exists (EMN/BAMF 2016b: 27).

3.2.5 Refraining from issuing return decisions

In case of a refusal of entry or a removal following an unauthorised entry, no return decision will be issued. Refusals of entry and removals following an unauthorised entry can be enforced without a preliminary warning or period for voluntary departure and do not fall under the provisions of the Return Directive (Hailbronner 2017: 359). In all other cases, the authorities may only refrain from issuing a removal warning in exceptional cases and on a case-by-case basis (59.1.2.1 of the General Administrative Regulation to the Residence Act). A removal warning is not necessary if the residence title was withdrawn or revoked (Section 59 subs. 3 no. 1 in conjunction with Section 51 subs. 1 nos. 3-5 of the Residence Act). The authorities may also refrain from issuing a removal warning if the person concerned was informed in writing about his or her obligation to leave the country, of the reasons for this decision and of the available legal remedies (Section 59 subs. 3 no. 2 in conjunction with Section 77 of the Residence Act). In such cases, the authorities must have good reasons to suspect that the person concerned is planning to abscond or the person concerned must pose a serious danger to public safety or law and order (Section 59 subs. 1 third sentence of the Residence Act).²² The lack of the necessary identity or travel documents is no reason to refrain from issuing a return decision, as the return decision is issued independently of the actual possibility to carry out the removal.

If, after a rejection of the asylum application, a removal warning is sent to the address given to the Federal Office for Migration and Refugees, but cannot be delivered, the warning is regarded as delivered at the time of its being mailed, even if it is returned as undeliverable (Section 10 subs. 2 fourth sentence of the Asylum Act). The warning shall be

redelivered only if, even though the asylum applicant has informed the Office of his or her new address (Section 10 subs. 1 of the Asylum Act), the warning was sent to an obsolete address. If the whereabouts of the person concerned are unknown, the removal warning may be issued nevertheless. In such cases the competent authority shall first try to determine the person's whereabouts. If this is impossible, the removal warning may be delivered by public notice. It is usually publicly displayed at a place determined by the authority. In the case of absconded asylum applicants and persons who have irregularly entered Germany and were allocated to the Länder, an alert may be entered in the Central Register of Foreigners to determine their whereabouts (Section 66 subs. 1 of the Asylum Act in conjunction with Sections 15a and 50 subs. 6 third sentence of the Residence Act).

If a person is found to have been irregularly resident when leaving Germany, the Federal Police will not take any measures to terminate that person's stay, as s/he is already complying with the obligation to leave. There will be no return decision issued to this person. If an asylum applicant returns to his or her country of origin during the asylum procedure, the asylum application is deemed to have been withdrawn and the procedure is discontinued (Section 33 subs. 3 of the Asylum Act), while no removal warning is issued.

3.2.6 Residence titles issued on humanitarian grounds

Pursuant to Art. 6 par. 4 of the Return Directive, the Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying irregularly on their territory. In that event, no return decision is issued. Under German residence law, there are several reasons to grant residence titles on humanitarian grounds to third-country nationals who would not be entitled to stay on other grounds (Sections 23-25 of the Residence Act).

Granting of residence by supreme Land authorities

The supreme Land authorities may order a temporary residence permit to be granted to third-country nationals from specific states or to certain groups of foreigners defined by other means, in accordance with international law, on humanitarian grounds or in order to uphold the political interests of the Federal Republic of Germany (Section 23 subs. 1 of the Residence Act). Such an order requires the approval of the Federal Ministry of the Interior (Section 23 subs. 1 third sentence of the Residence Act). Pursuant to Section 23 subs. 2 of the Residence Act, the Federal Ministry of the Interior itself may order that certain groups of foreigners be granted admission. This admission may be extended to foreigners still living abroad or to foreigners already resident

²² For more details on compliance with the Return Directive see Hailbronner 2017: 373.

in Germany, with Section 23 subs. 2 of the Residence Act referring mainly to foreigners still living abroad (Hecker 2017: § 23 margin no. 7). In the past, Section 23 subs. 1 of the Residence Act has been repeatedly used to grant a right of residence to persons whose removal had been suspended for years, for example (Bergmann/Dienelt 2016: § 23 margin no. 13).

Granting of residence in cases of hardship

All Länder have established a hardship commission, which may petition the supreme Land authority for a residence title in specific cases (Section 23a subs. 1 first sentence of the Residence Act; Bergmann/Dienelt 2016: § 23 margin no. 4). In order to do so, the hardship commission needs to conclude first that urgent humanitarian or personal grounds justify the foreigner's continued presence in the Federal territory (Section 23 subs. 2 fourth sentence of the Residence Act). Such decisions are discretionary and rest on political or humanitarian reasons; the Land authority is not bound by the recommendation of the hardship commission. A hardship procedure is no obstacle to removal, however, as the person concerned is still enforceably required to leave the country during the procedure (Hailbronner 2017: 199).

Granting of residence to victims of human trafficking or illegal employment

Based on European Directives issued to combat human trafficking²³ and illegal employment of third-country nationals²⁴, persons who are enforceably required to leave the country may be issued with a residence permit if they are the victims of such crimes, if their presence is considered to be appropriate in connection with criminal proceedings and if they have declared their willingness to testify as a witness in the criminal proceedings relating to the offence (Section 25 subs. 4a and 4b of the Residence Act).²⁵

Granting a temporary residence permit

The foreigners authorities may grant a temporary residence permit on urgent humanitarian or personal grounds or due to substantial public interests (Section 25 subs. 4 first sentence of the Residence Act). However, this presupposes that

the person concerned is not enforceably required to leave the country, i.e. that s/he is still entitled to stay in Germany or that s/he may still file an appeal against a return decision. Such a residence permit may be granted for a medical operation or treatment or in order to allow the person concerned to finish his or her schooling or to marry (Bergmann/Dienelt 2016: § 25 margin no. 64). If the person concerned is enforceably required to leave the country, the removal may be suspended in such cases (Section 60a subs. 2 third sentence of the Residence Act).

Suspending removal or granting a residence permit because removal is impossible

If a removal is impossible in fact or in law, it shall be suspended (Section 60a subs. 2 first sentence of the Residence Act). This suspension ("Duldung") is not equivalent to a residence permit, but only certifies that removal is temporarily suspended (Section 60a of the Residence Act). Persons whose removal is suspended are still enforceably required to leave the country, and the return decision remains in force. If, however, it appears unlikely that the obstacle to removal is removed in the foreseeable future, the foreigners authority may issue the person concerned with a temporary residence permit (Section 25 subs. 5 of the Residence Act). Such a temporary residence permit should be issued after 18 months (Section 25 subs. 5 second sentence of the Residence Act). However, it may be granted only if the person concerned is prevented from leaving Germany through no fault of his or her own, with fault on the part of the person concerned applying in particular if s/he furnishes false information, deceives the authorities with regard to his or her identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure (Section 25 subs. 5 third and fourth sentences of the Residence Act).

Beyond this provision, there are several other options for persons whose removal has been suspended to legalise their stay in Germany (for an overview see Grote/Vollmer 2016).

²³ Council Directive 2004/81/EC of 29/04/2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

²⁴ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

²⁵ For more details see Tangermann/Grote 2017: 52 et seq. and EMN/BAMF 2017: 67.

4 Period for voluntary return

4.1 Provisions set out in the Return Directive and the Commission Recommendation

Every return decision shall provide for an appropriate period for voluntary departure between seven and thirty days (Art. 7 par. 1 RD). The Directive gives the Member States the option of granting such a period only after an application to that effect. In exceptional cases the period may be shortened or not be granted at all, for example if there is a risk of absconding, if an application for a residence title or for asylum was dismissed as manifestly unfounded or fraudulent or if the third-country national poses a risk to public security or law and order (Art. 7 par. 4 RD). At the same time the period may be extended, for example to permit children who are obliged to leave the country to go to school, if the third-country nationals concerned have been staying for a long period in the Member State or if they have family or social links in the Member State (Art. 7 par. 2 RD). During this period, the Member States may impose certain obligations on the third-country nationals concerned in order to prevent absconding (see Chapter 5.2.2).

According to the Commission Recommendation, the Member States should apply only the minimum standards of the Return Directive, i.e. grant the period for voluntary departure only upon application and keep it as short as possible while taking into account the individual circumstances of the case and the prospects of return (COM 2017b: recommendation 17-19). A period longer than seven days should only be granted if the person concerned actively cooperates in the return preparations (COM 2017b: recommendation 20). In particular, the Member States should not grant a period for voluntary return if there is a risk of absconding (COM 2017b: recommendation 21).

At the same time the Member States should inform persons who are obliged to leave their territory better about options for assisted return and offer such programmes (COM 2017b: recommendations 22 and 23). And finally, the Commission recommends that the Member States put in place means to verify whether a person who is obliged to leave the country has indeed done so during the period allotted for voluntary departure (COM 2017b: recommendation 24b).

4.2 Implementation in Germany

4.2.1 Length of the period for voluntary departure

A removal warning usually specifies a period between seven and 30 days for voluntary departure; a separate application for this period is not necessary (Section 59 subs. 1 first sentence of the Residence Act). Granting this period for voluntary departure became obligatory with the implementation of the Return Directive; before, it was recommended, but the authorities were not obliged to do so. The length of the period, too, was not specified by law until the Return Directive was implemented.

If an asylum application is rejected, the length of the period for voluntary departure depends on the decision by the Federal Office for Migration and Refugees. If the application is manifestly unfounded, the person concerned must depart within seven days (Section 36 subs. 1 of the Asylum Act), if it is rejected for other reasons, the period is 30 days (Section 38 subs. 1 of the Asylum Act). If the removal warning is issued by the foreigners authority, this authority shall decide on the length of the period for voluntary departure at its discretion. In general, this period is 30 days (Grote 2015: 59; Bauer 2016: § 59 margin no. 21 et seq.). The foreigners authority shall consider the public interest in a quick departure of the person concerned on the one hand and the person's private interests on the other (Bauer 2016: § 59 margin no. 21 et seq.). The period for departure should be long enough to enable the person to avoid removal by leaving the Federal territory beforehand and bring their professional and private relationships in the Federal territory to a satisfactory closure, particularly with a view to the length of their stay in Germany (Bauer 2016: § 59 margin no. 21). In addition, the period for voluntary departure shall give the persons concerned the opportunity to exploit legal remedies against the return decision (Marx 2017: 177).

The period for voluntary departure may be shortened or waived altogether if doing so is vital to safeguard overriding public interests (Section 59 subs. 1 second sentence of the Residence Act). In particular, this is the case if there is a well-founded suspicion that the person concerned intends to evade removal (see Chapter 5) or if s/he poses a serious danger to public safety or law and order (Section 59 subs. 1 second sentence of the Residence Act; see Hailbronner 2017: 372). If the person concerned is held in detention or public custody, no period for voluntary departure is

necessary; s/he shall be removed directly from detention or public custody (Section 59 subs. 5 first sentence of the Residence Act). In case of a removal order under the Dublin procedure, no period for voluntary departure shall be set either.

Under certain conditions, the period for voluntary departure may be extended (Section 59 subs. 1 fourth sentence of the Residence Act). As the exact length of the period for departure will be set at the discretion of the responsible authority, all circumstances of the individual case shall be taken into account and the reasons for the length of this period shall be set out in writing (Kluth 2017: § 59 margin no. 19). A long stay in Germany, children who are obliged to attend school or the existence of other family or social relationships are usually arguments for a longer period for departure (Marx 2017: 177; Bauer 2016: § 59 margin no 21). In particular, planning for a voluntary departure, for example under an assistance programme, may take more than the usual 30 days. Whether the period is indeed extended often depends on how well the foreigners authorities are informed of the particular circumstances of a case and in how far they take them into account (Grote 2015: 59). The law explicitly foresees a longer period for voluntary return if:

- an asylum applicant withdraws the application
- an action brought against the decision of the Federal Office for Migration and Refugees is withdrawn, or if
- the legal representative of a minor declares that the asylum procedure shall be waived.

If in these cases, the person concerned is willing to leave Germany, s/he may be given up to three months to do so (Section 38 subs. 3 of the Asylum Act). If there are grounds to suspect that the person concerned is a victim of human trafficking or illegal employment, the period for voluntary departure shall be at least three months as a rule (Section 59 subs. 7 of the Residence Act).

4.2.2 Verification of departure within the period for voluntary departure

The departure is usually verified by a so-called border crossing certificate ("GÜB"). This border crossing certificate is usually issued together with the removal warning (50.4.1.1 of the General Administrative Regulation to the Residence Act). The person concerned is obliged to surrender the certificate at the border control when leaving the Federal territory or to the German diplomatic mission to the country of destination (Marx 2017: 796).

If the departure is not verified by surrender of the border crossing certificate or other means, for example the surrender of a used ticket, and the whereabouts of the person concerned are unknown, the police may use their search tools

to determine the person's whereabouts and apprehend him or her (Section 50 subs. 6 first sentence of the Residence Act) and an alert for him or her may be included in the Schengen Information System (SIS; Kohls 2014: 14).

4.2.3 Challenges and measures with regard to the period for voluntary departure

The period for voluntary departure raises challenges for both the authorities and the persons concerned (see also table 4).

For the authorities, the biggest challenges are that often, a departure within the period cannot be verified and that persons may abscond in order to evade removal. Particularly if the foreigners leave Germany via one of the borders which are not controlled, the border crossing certificate will often not be surrendered so that it becomes difficult to verify their departure (see 50.4.1.1.1 of the General Administrative Regulation to the Residence Act). As a result, the number of non-assisted voluntary departures cannot be fully captured in the Central Register of Foreigners. The register only captures the number of those who have indeed contacted the responsible authorities after their departure (Deutscher Bundestag 2017c: 55). That is why a 'Working Group on Statistics' within the framework of the Repatriation Support Centre (see Chapter 2.2.2) shall determine under what circumstances a voluntary departure shall be regarded as having taken place, even if the border crossing certificate is not surrendered. The working group's task is to determine criteria which suggest that a departure has indeed taken place and is stored as such in the Central Register of Foreigners (for example indications which, after the lapse of a period still to be defined, suggest that the person has returned to his or her country of origin or left the EU). With a view to absconding, the legal amendments of the last few years and in particular the 'Act to Improve the Enforcement of the Obligation to Leave the Country' have extended the means to observe and restrict the movement of persons who are obliged to leave Germany. Since the Act only entered into force on 29 July 2017, it remains to be seen to what extent the new provisions prevent absconding during the period for voluntary departure or increase the willingness to depart.

With regard to the persons concerned and the promotion of autonomous or assisted returns, other studies have shown that setting an excessively short period for voluntary departure may reduce compliance with this obligation, as the period is simply too short to prepare and implement a voluntary departure even if the persons concerned are willing to do so (Grote 2015: 59; SVR 2017: 31). In some cases, the authorities are already preparing a removal even though it is not clear yet whether the person concerned is willing

to depart autonomously (SVR 2017: 31). The Commission Recommendation to grant a period for voluntary departure only on request and to keep this period as short as possible might run counter to the goal of better informing about assisted return options and to preferring voluntary returns over removals.

Table 4 gives an overview of the challenges in connection with the period for voluntary return and lists measures which the Federal Office for Migration and Refugees and the Repatriation Support Centre have taken or are planning to take to deal with these challenges:

Table 4: Challenges and measures concerning the period for voluntary departure

Challenges	Yes/No/In some cases	Measures
Excessively short period	In some cases	<ul style="list-style-type: none"> Extension of the period in individual cases and at the discretion of the authorities, for example if the person concerned can credibly claim that s/he has applied for REAG/GARP assistance Raising awareness and improving the information of all stakeholders (such as foreigners authorities or welfare associations) for better use of the legal framework to support voluntary returns (Grote 2015: 58)
Absconding during the period for voluntary return	In some cases	<p>Earliest possible information about the legal consequences of a removal (longer re-entry ban, obligation to bear the costs) and of absconding with the goal of convincing the person concerned to depart voluntarily (see Grote 2014: 41). At the Federal level, the following actions are taken:</p> <ul style="list-style-type: none"> provision of information, for example by the return hotline or the online return portal (see Chapter 2.2.2) discussion of return opportunities and handing out a return information package at the time of the filing of the asylum application.* a leaflet with information about voluntary returns which is dispatched together with the rejection decision of the Federal Office for Migration and Refugees
Verification of the departure within the period for voluntary departure	Yes (border crossing certificate not surrendered in many cases)	<ul style="list-style-type: none"> Setting criteria for assuming that voluntary departure has taken place even if the border crossing certificate is not surrendered (see above)

* During the interview, the foreigner is informed about the option of voluntary return and about the disadvantages of absconding and living clandestinely. The information package is tailored to the country of origin and contains the address of the nearest return advisory office in the Land. The information about return opportunities was newly introduced in all arrival centres and branch offices of the Federal Office for Migration and Refugees at the end of June 2017. The initiative is based on a pilot project in the area of integrated return management (see EMN/BAMF 2017: 61).

5 Absconding of persons who are obliged to leave the country

5.1 Provisions set out in the Return Directive and the Commission Recommendation

According to the Commission Recommendation, absconding by persons who are obliged to leave the country is one of the main reasons why it is often impossible to implement removal decisions (COM 2017b). The risk of absconding is defined as “the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond” (Art. 3 no. 7 RD).

In order to prevent absconding, the Member States may impose certain obligations on persons who are obliged to leave the country during the period for voluntary departure. By way of example, the Return Directive mentions regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place (Art. 7 par. 3 RD). If there is a risk of absconding, the Member States may even refrain from granting a period for voluntary departure (Art. 7 par. 4 RD; see Chapter 4). The risk of absconding is one of the two reasons why detention may be ordered under the Directive (Art. 15 par. 1 letter a RD). The Commission Recommendation sets out criteria which should constitute a (rebuttable) presumption that there is a risk of absconding. These are as follows:

- refusal to cooperate in the identification process by using false or forged identity documents, destroying or otherwise disposing of existing documents, refusing to provide fingerprints;
- violent or fraudulent opposition to the operation of return;
- non-compliance with a measure aimed at preventing absconding;
- non-compliance with an existing entry ban;
- unauthorised secondary movement to another Member State (COM 2017b: recommendation 15).

The Recommendation also contains other criteria which the Member States should take into account when determining whether there is a risk of absconding. These are as follows:

- explicit expression of the intention of non-compliance with a return decision;

- non-compliance with a period for voluntary departure;
- existing conviction for a serious criminal offence (COM 2017b: recommendation 16).

5.2 Implementation in Germany

5.2.1 Definition of “risk of absconding”

A risk of absconding is deemed to exist if there are, in an individual case, reasons deriving from evidence to justify a well-founded suspicion that a person intends to evade removal by absconding (Section 62 subs. 3 first sentence no. 5 of the Residence Act). The criteria for assuming that there is a risk of absconding were set out in the ‘Act Redefining the Right to Remain and the Termination of Residence’ in 2015 in line with a Federal Court of Justice judgment of 26 November 2014. In the framework of a procedure dealing with detention under the Dublin Regulation, the Federal Court of Justice had decided that ordering detention on the grounds of a risk of absconding (Section 62 subs. 3 first sentence no. 5 of the Residence Act) did not comply with the requirements of the Dublin Regulation.²⁶ Any assumption of a risk of absconding has to be based on objective criteria defined by law both under the Dublin Regulation and the Return Directive (Art. 2 letter n of the Regulation (EU) no. 604/2013; Art. 3 par. 7 RD). The Federal Court of Justice ruled that this was not the case under German law. Instead, all assumptions of a risk of absconding were based on criteria developed by case law. These criteria form the basis of the list of criteria which is now set out in Section 2 subs. 14 of the Residence Act (Winkelmann 2016: § 62 margin nos. 75-96).

Pursuant to Section 2 subs. 14 of the Residence Act, the following criteria suggest that there is a risk of absconding (for some, further conditions apply):

- previous absconding by changing the place of residence without notifying the competent authority,
- deceiving the authorities regarding one’s identity, in particular by suppressing or destroying identity or travel documents or by claiming a false identity,
- refusal to cooperate regarding the establishment of one’s identity,

²⁶ Federal Court of Justice, decision of 26 June 2014, V ZB 31/14.

- payment of substantial amounts for the unauthorised entry (e.g. to a smuggler)
- explicit expression of the intention to evade removal,
- concrete preparations to evade removal.

If one of the criteria is met, this is only an indication that there might be a risk of absconding. Every case needs to be examined separately (Marx 2017: 841).

Table 5 gives an overview of the criteria set out in the Commission Recommendation and in the Residence Act to

determine whether a risk of absconding exists. While, under German law, some of these criteria are not regarded as reasons to assume a risk of absconding, they may serve as an independent reason to order detention (see Chapter 6.3.2).²⁷

²⁷ In contrast to the Return Directive, German law does not differentiate between the risk of absconding and avoiding or hampering the removal process as possible grounds for detention. Rather, the risk of absconding is regarded as a specific case of avoiding or hampering the removal process (Hailbronner/Thym, no year: 8). Other reasons for detention related to hampering the removal procedure are listed in Section 62 subs. 3

Table 5: Criteria to determine whether a risk of absconding exists

Elements/Behaviour	Criterion for the presumption of a risk of absconding (Yes/No)	Legal basis	Comments
Refusal to cooperate in the identification process, for example by using false or forged identity documents, destroying or otherwise disposing of existing documents or refusing to provide fingerprints	Yes	Section 2 subs. 14 no. 2 and 3 of the Residence Act	
Violent or fraudulent opposition against the enforcement of the obligation to return	No, but independent reason to order detention	Section 62 subs. 3 first sentence no. 4 of the Residence Act	For more details see Winkelmann 2016: § 62 margin no. 74
Non-compliance with a measure aimed at preventing absconding	To some extent	Section 2 subs. 14 no. 1 of the Residence Act Section 62 subs. 3 first sentence no. 2 of the Residence Act	A risk of absconding can be assumed if the person has evaded the authorities in the past by not complying with the requirement to notify the competent authority of a change of place of residence. Once the period for voluntary departure has passed, detention may be ordered if the person changes his or her place of residence without notifying the authorities of this fact.
Unauthorised secondary movement to another Member State	No		
Explicit expression of the intention of non-compliance with a return decision	Yes	Section 2 subs. 14 no. 5 of the Residence Act	
Non-compliance with a period for voluntary departure	No	Section 62 subs. 3 no. 2 of the Residence Act; 62.2.1.6 of the General Administrative Regulation to the Residence Act	No indication of a risk of absconding. Detention can be ordered only if the person concerned has also changed his or her place of residence without providing the responsible authority with an address where s/he can be reached.
Conviction for a serious criminal offence	Yes		May be an indication of a risk of absconding if it suggests that the person concerned will not be law-abiding in the future either; however, a number of circumstances have to be taken into account, such as previous instances of absconding, the type of the crime, numerous instances of lying or a lack of a regular place of residence (see Winkelmann 2016: § 62 margin no. 81; Hailbronner/Thym, no year: 8).
Evidence of previous absconding	Yes; also an independent reason to order detention	Section 2 subs. 14 no. 1 of the Residence Act; Section 62 subs. 3 first sentence nos. 2 and 3 of the Residence Act	If the person concerned has evaded the authorities in the past by not just temporarily changing his or her place of residence without providing the responsible authority with an address where s/he can be reached, a risk of absconding may be assumed. Moreover, there is a reason to order detention if the person concerned is not found at his or her address after a removal warning or if s/he changes his or her place of residence without notifying the authorities of this step after the period for voluntary departure has passed.

Elements/Behaviour	Criterion for the presumption of a risk of absconding (Yes/No)	Legal basis	Comments
Provision of misleading information	No		Misleading information, for example concerning the person's identity or residence, is not an indication of a risk of absconding as such; this is only the case if the person intends to deceive the authorities about his or her identity in order to prevent removal (Marx 2017: 843).
Non-compliance with an existing entry ban	No	Section 62 subs. 3 first sentence 1 no. 1 of the Residence Act	Non-compliance with an entry ban as such is not a reason to assume a risk of absconding. However, unauthorised entry may be a reason to order detention unless the stay becomes legal after the entry (for example because an asylum application is filed; see Hailbronner 2017: 385).
Lack of financial resources	No	62.2.1.6 of the General Administrative Regulation to the Residence Act	However, the fact that considerable sums have been invested in the journey, for example payments to people smugglers, may be a reason to assume that there is a risk of absconding (Section 2 subs. 14 no. 4 of the Residence Act).

5.2.2 Measures to prevent absconding

As soon as a person is obliged to leave the country, the authorities can take a number of measures to prevent absconding. The measures described below can in principle be taken regardless of whether the period for voluntary departure is still running or already over.²⁸ At the same time, they are alternatives to ordering detention on the grounds of a risk of absconding, and the authorities must check whether they are feasible before ordering detention. However, from the vantage point of the Federal government, alternatives to detention are not always sufficient to ensure removal if there is indeed a risk of absconding (Deutscher Bundestag 2016a: 119). If no other measure can be applied effectively, detention may be ordered as a last resort (see Chapter 6.3).

Taking the passport or passport substitute into custody

The passport or passport substitute of a person who is required to leave the Federal territory should be taken into custody (Section 50 subs. 5 of the Residence Act). This should be done regardless of whether there are indications that the person concerned plans to destroy the passport, make it useless or withhold it from the authorities (50.6.1 of the General Administrative Regulation to the Residence Act). Only in exceptional cases may the person concerned keep the passport, for example because s/he has an overriding interest in keeping the passport, a certified copy is not sufficient and keeping the passport will not endanger the removal. In the case of third-country nationals who do not need a visa to enter Germany, it may not be necessary to take the passport into custody depending on the practical experience

of the responsible authority. The same applies if the country of origin usually issues passport substitutes and if the foreigners authority has a copy of the passport in its keeping (50.6.2 of the General Administrative Regulation to the Residence Act). If the passport is taken into custody nevertheless, it may be temporarily surrendered to its owner for compelling reasons.

Notification and reporting duties

Persons who are obliged to leave the Federal territory are obliged to notify the foreigners authority if they want to change their address or leave the district covered by the foreigners authority for more than three days (Section 50 subs. 4 of the Residence Act). Moreover, the foreigners authority may, at its discretion, require persons who are obliged to leave the country to report at least once a week to the local police station if

- a removal order has been issued against the person concerned (Section 58 of the Residence Act),
- this is necessary to prevent a danger to public security and order, or
- there is a particular interest in having the person removed because s/he threatens the free democratic basic order or the security of the Federal Republic of Germany, is or was a leader of a banned organisation, is involved in violent activities or calls publicly for the use of violence or incites others to hatred (Section 56 subs. 1 second sentence in conjunction with Section 54 subs. 1 nos. 2-5 of the Residence Act).

Residence restrictions

The residence of persons who are enforceably obliged to leave the Federal territory shall be restricted to the Land in which the responsible foreigners authority is situated (Section 61 subs. 1 first sentence of the Residence Act). Moreover,

first sentence of the Residence Act (see Chapter 6.3.2).

28 Several commentators argue that only those measures which aim to prevent a risk of absconding are admissible during the period for voluntary departure pursuant to Art. 7 par. 3 RD (Hörich 2015: 133).

the foreigners authority may restrict them to an administrative district, a municipality or a certain place of residence when concrete measures to terminate the stay are imminent (Section 61 subs. 1 sentence 1c no. 3 of the Residence Act; Bauer 2016: § 61 margin no. 7). This is the case if the foreigners authority has taken or induced concrete measures to terminate the person's stay in Germany (Deutscher Bundestag 2014b: 9).²⁹

The 'Act to Improve the Enforcement of the Obligation to Leave the Country' introduced the provision that all persons who are obliged to leave the country shall be restricted to the district covered by the responsible foreigners authority if they have wilfully given false information, deceived the authorities about their identity or nationality and thus prevented a removal or not complied with reasonable requirements during the procedure to overcome obstacles to their removal (Section 61 subs. 1c of the Residence Act).

Persons who are required to report to the local police station (see above) are also restricted to the district covered by the responsible foreigners authority (Section 56 subs. 2 of the Residence Act). They may also be obliged to live in a different place or at a certain place of accommodation (Section 56 subs. 3 of the Residence Act).

Electronic surveillance

The 'Act to Improve the Enforcement of the Obligation to Leave the Country' also introduced the option of ordering electronic surveillance of the same group of persons if such a measure is necessary to counteract a considerable danger to domestic security or life and limb of others (Section 56a subs. 1 of the Residence Act). The person concerned has to carry the surveillance device on his or her body at all times and it has to be in working condition constantly. The surveillance can be ordered for a maximum of three months and extended by three-month periods (Section 56a subs. 2 of the Residence Act). It will be conducted by the responsible foreigners authority (Section 56a subs. 3 of the Residence Act).

Departure facilities and special reception centres

In addition, the Länder may establish departure facilities to promote the willingness to depart voluntarily by offering support and advice and to ensure that the persons can be contacted by the authorities and courts and that the departure does indeed take place (Section 61 subs. 2 of the Residence Act). "The departure facilities aim to offer

psychological and social assistance to open up a perspective outside Germany. The establishment of departure facilities is part of an increased effort to promote voluntary returns" (Bauer 2016: § 61 margin no. 3). At the time of writing, only a handful of departure facilities had been established by the Länder (for example in Schleswig-Holstein; Ministerium für Inneres und Bundesangelegenheiten 2016). The Federal Ministry of the Interior is currently considering the establishment of departure facilities at the Federal level (BMI 2017b).

In addition, the Länder may establish special reception centres on the basis of the provisions of the Asylum Package II, which entered into force on 17 March 2016 (Section 30a subs. 1 of the Asylum Act). Under certain conditions, asylum seekers are obliged to remain at these reception centres until their asylum procedure is completed or, in case of a rejection of their asylum application, until their return. The aim is to make their removal easier. The special reception centres shall be used as accommodation for applicants from safe countries of origin or for persons who file a subsequent application or have given false information about their identity or nationality. Currently, such special reception centres have been established in Bavaria, for example (Bamberg and Manching; EMN/BAMF 2017: 62).

Prohibition of announcing removals

The Asylum Package I introduced a ban on announcing removals in advance (Section 59 subs. 1 eighth sentence of the Residence Act). Before, several Länder had announced removal dates in advance (EMN/BAMF 2016a: 44). In the case of persons whose removal has been suspended for more than one year, removal must normally still be announced at least one month in advance, unless the person concerned has caused the impossibility of removal by intentionally providing false information or by deception regarding his or her identity or nationality or has not contributed sufficiently to overcome obstacles to removal (Section 60a subs. 5 fourth and fifth sentence of the Residence Act). The ban on announcing removals in these cases was introduced by the 'Act to Improve the Enforcement of the Obligation to Leave the Country'. The ban aims to prevent the absconding of persons who are obliged to leave Germany; in addition, the Federal government believes that it helps to further the goal of the Return Directive to enforce return decisions effectively (Deutscher Bundestag 2015b: 50). There has been some criticism of this provision, which is thought to make it more difficult to assert reasons for a suspension of the removal, and thus to rely on effective legal remedies (Bauer 2016: § 59 margin no. 7). At the same time, the ban on announcing removals also makes it more difficult to prove that a person has tried to evade removal, which affects the ordering of detention (see Chapter 6.3.2).

²⁹ This provision is not particularly relevant in practice, as the authorities would have to inform the person concerned that measures to terminate his or her stay are imminent when restricting their freedom of movement. This, however, could run counter to "surprising" them with a removal and rather encourage the foreigners to abscond (Rosenstein 2015: 229 et seq.).

Further measures

The foreigners authority may impose other conditions and requirements for surveillance, monitoring and return purposes (Rosenstein 2015: 230; Section 61 subs. 1e of the Residence Act). However, such conditions and requirements must be appropriate and useful and may not be taken as a sanction or an act of harassment. For example, persons may be required to attend a return counselling session or save money towards paying for the return expenses (Bauer 2016: § 61 margin no. 10).

In addition, the foreigners authorities can take measures to promote the departure (Section 46 subs. 1 of the Residence Act). The General Administrative Regulation to the Residence Act lists potential measures:³⁰

- “46.1.4.1. – the obligation to report regularly to the foreigners authority for the purpose of monitoring the place of residence,
- 46.1.4.2 – the obligation to attend a return counselling session,
- 46.1.4.3 – the obligation to save a certain amount of money, which must be determined and is not necessary to secure the absolute subsistence minimum, towards paying the return expenses and deposit this money on a blocked account administered by the foreigners authority,
- 46.1.4.4 – the obligation to live at a certain place or accommodation,
- 46.1.4.5 – the obligation to not leave a certain area,
- 46.1.4.6 – the obligation to hand over documents to the foreigners authority which, in the case of document controls, might wrongly give the impression that the person concerned was entitled to stay or not obliged to leave the country; this applies in particular to provisional residence documents after the rejection of an application for a residence title.”

³⁰ See also Grote 2014: 42.

6 Enforcement of return decisions

The Return Directive obliges the Member States to take all necessary measures to enforce the return decision after the period for voluntary departure has ended (Art. 8 par. 1 RD). This includes organising assisted returns or removals, with procuring travel documents being a key challenge. If persons who are obliged to leave the Federal territory do not do so during the period for voluntary departure, they may be returned forcibly. The authorities may order sanctions and in particular cut the benefits granted to persons who do not comply with their obligation to depart. As a last resort, they may order detention.

6.1 Organising returns

6.1.1 Commission Recommendation and EU travel documents

The Return Directive does not contain key provisions concerning the organisation of returns.³¹ Pursuant to the Commission Recommendation, any necessary travel documents should be requested from the country of destination directly after a return decision has been taken. Alternatively, the country of destination may be requested to accept EU travel documents for returns (COM 2017b: recommendation 9c). Back in 1994, the EU Council already adopted a recommendation³² for a 'standard travel document for the expulsion of Non-EU Member Country nationals', which the Member States could use to enforce returns. However, as third countries did not generally recognise this document, the European Parliament and the Council adopted Regulation (EU) no. 2016/1953³³ which established a European travel document for return purposes and set out its format, security features and technical specifications. The Regulation has been in effect since 8 April 2017.

³¹ Pursuant to Art. 8 par. 5 RD, the Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC when conducting a removal by plane.

³² Council Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of Non-EU Member Country nationals.

³³ Regulation (EU) no. 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994.

In addition, the Commission recommends using the instrument of mutual recognition of return decisions issued by other Member States (COM 2017b: recommendation 9d). This refers to Directive 2001/40/EC³⁴ and the 'Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals'.

6.1.2 Return organisation in Germany

Requesting travel documents from third countries

In principle, the Länder are responsible for procuring travel documents for return purposes. Most Länder have established central foreigners authorities which are, among other things, responsible for procuring passports and often take over the complete organisation of removal operations (SVR 2017: 17).

The Permanent Conference of Ministers and Senators for the Interior of the Länder (IMK) asked the Federal Ministry of the Interior in June 2017 to check whether the Repatriation Support Centre could directly handle cases in which there are problems concerning passport substitutes (IMK 2017: 8). For some countries of destination³⁵, the Federal Police procures passport substitutes, either in its own right or on behalf of the Länder. In addition, the Federal Police supports the Länder in procuring passport substitutes for Egypt, Algeria, Morocco and Tunisia, particularly in difficult cases. The Federal Police shall apply for passport substitutes if

1. the person was identified by an embassy/consulate/delegation
2. the responsible foreigners authority takes care of the necessary preparations (usually booking a flight etc) and requests the country of origin to issue a passport substitute via the Federal Police.

³⁴ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

³⁵ Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Sudan, Togo and Vietnam.

Depending on the co-operation of the country of destination and its embassies and the number of cases, the Federal Police may organise joint hearings for identification purposes. Agreements have been signed with several countries to accelerate the identification process. For example, Moroccan nationals can usually be identified by their fingerprints within a relatively short amount of time. A similar procedure is currently being established with Tunisia. In the case of Vietnam, persons can be identified by lists, providing that they are registered in Vietnam. The Federal Police regularly invites delegations from the countries of origin whose embassies do not or not sufficiently cooperate.

The Federal Ministry of the Interior has prepared a list with the major countries of origin (by number of persons who are obliged to leave Germany) which also includes information on their willingness to cooperate (e.g. acceptance of EU travel documents, issuance of passport substitutes, choice of means of transport; Deutscher Bundestag 2017a: 16). The time needed to procure a passport substitute depends on the country of destination and the individual case, which is why there is no general timetable for this procedure.

Use of EU travel documents

Only a small number of third countries recognise EU travel documents for the purpose of assisted returns or removals from Germany.

In September 2015, the Federal government launched a diplomatic initiative with the goal of ensuring that an EU travel document is accepted for returns to the following countries of destination: Serbia, Bosnia and Herzegovina, Macedonia, Albania, Kosovo, Montenegro, Egypt, Algeria, Lebanon, Morocco, Ethiopia, Eritrea, Bangladesh, India, Pakistan, Benin, Burkina Faso, Ghana, Guinea, Guinea-Bissau, Mali, Nigeria and Niger. In the end, only the western Balkan countries agreed to this procedure (in the case of Bosnia and Herzegovina only with the proviso of a time limitation). The other countries still refuse to accept removals for which an EU travel document is used. Independent of this initiative, EU travel documents may be used for removals to Afghanistan on the basis of the joint declaration signed on 2 October 2016 (see BMI 2016).

If EU travel documents are used for assisted returns and removals, the countries of destination do not issue the documents themselves. This and the necessary establishment of identity is the responsibility of the Länder organising the return (Reuters 2015). For the purpose of uniformity, the Federal Ministry of the Interior, the Federal Foreign Office and the Federal Police have prepared a manual for the Länder (BMI 2016).

Recognition of return decisions by other Member States

A person is also enforceably obliged to leave the Federal territory if another Member State of the European Union has issued the return decision (Section 58 subs. 2 no. 3 of the Residence Act in conjunction with Art. 3 of the Directive 2001/40/EC). Any decisions concerning the recognition of return decisions by other Member States are taken by the foreigners authorities (58.2.1.3.2 of the General Administrative Regulation to the Residence Act). The foreigners authorities also decide upon the application of the 'Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals' when enforcing return decisions by other Member States. In practice, however, these provisions are not of major importance (Masuch/Gordzielik 2016: § 58 margin no. 8).

6.2 Sanctions for persons who are enforceably required to leave the Federal territory

6.2.1 Commission Recommendation

The European Commission recommends that the Member States should use sanctions against irregularly staying third-country nationals who intentionally obstruct the return process. These sanctions should be effective, proportionate and dissuasive and not impair the overarching goal of the Return Directive, i. e. the effective return of persons who are obliged to leave the EU (COM 2017b: recommendation 11).

6.2.2 Potential sanctions against persons who are obliged to leave Germany

Beyond the duties and obligations mentioned above (see Chapter 5.2.2), the German authorities may also impose sanctions against persons who are required to leave the country. Only some of the sanctions mentioned below are directed against persons who do not cooperate during the return preparations or obstruct them intentionally; several sanctions may be directed against all those who are required to leave Germany.

Sanctions under criminal law

Persons who are enforceably required to leave Germany and whose removal is not suspended are punishable with up to one year's imprisonment or a fine once the period for voluntary departure is over (Section 95 subs. 1 no. 2 of the

Residence Act). In addition, they can be fined for failing to comply with notification or reporting duties or residence restrictions (see Chapter 5.2.2; Section 98 subs. 3 nos. 4, 5 and 5a of the Residence Act).

Residence restrictions

The residence of a person who is required to leave Germany is restricted to the territory of the Land concerned (Section 61 subs. 1 first sentence of the Residence Act). If persons who are required to leave Germany obstruct their removal by wilfully giving false information or deceiving the authorities about their identity or nationality or by not complying with reasonable requirements to cooperate during the procedure to overcome obstacles to removal, their residence may be restricted to the district covered by the responsible foreigners authority (Section 61 subs. 1c of the Residence Act; see Chapter 5.2.2).

Obligation to bear removal expenses

If persons are indeed removed, they are obliged to bear the costs of the removal and of the detention pending removal (Sections 66 subs. 1 and 67 subs. 1 no. 2 of the Residence Act). Paying these expenses is often a precondition for being allowed to apply for a residence title or a visa after a removal (Grote 2014: 41).

Benefit cuts

If a departure date has been set, but is not complied with or if a removal cannot be carried out, the person concerned will receive only receive benefits to cover nutrition and accommodation needs – including heating and hygiene and healthcare necessities – if s/he is responsible for the non-departure (Section 1a subs. 2 and 3 of the Act on Benefits for Asylum Applicants).

If persons who are enforceably required to leave Germany cannot be removed for legal or material reasons, their removal is suspended (Section 60a of the Residence Act). If it is the foreigners' fault that they cannot be removed from Germany, for example because they have deceived the authorities about their identity or do not comply with "reasonable demands to eliminate the obstacles to departure", they cannot be granted a residence permit even if the conditions for it are otherwise met. (Section 25 subs. 5 fourth sentence of the Residence Act; see Chapter 3.2.6). Moreover, such persons receive only "inalienable" benefits under the Act on Benefits for Asylum Applicants (Section 1a subs. 1 of the Act on Benefits for Asylum Applicants) and may not engage in gainful employment (Section 60a subs. 6 first sentence no. 2 of the Residence Act).

6.3 Detention pending removal

6.3.1 Provisions set out in the Return Directive and the Commission Recommendation

The Return Directive permits the Member States to detain third-country nationals in order to prepare their return or enforce their removal if no other sufficient but less coercive measures can be applied. Pursuant to the Directive, this is the case in particular if there is a risk of absconding or if the person who is enforceably required to leave the country avoids or hampers the preparation of the return process (Art. 15 par. 1 RD). Moreover, detention is only justified if there is a reasonable prospect of removal (Art. 15 par. 4 RD). The detention must be as short as possible and extend only during the preparation of the removal (Art. 15 par. 1 and 5 RD). The Member States must set a maximum period of detention, which may not exceed six months (Art. 15 par. 5 RD).

The detention may be extended by a maximum of twelve months if, despite adequate efforts by the authorities, the removal operation is likely to take longer because the person concerned is not cooperating or because the necessary documentation from the country of destination is delayed (Art. 15 par. 6 RD). Pursuant to Article 16 of the Return Directive, the detention shall in principle take place in specialised detention facilities. Prison accommodation is permitted only if a Member State does not have specialised detention facilities (see Chapter 6.3.2).

The Commission recommends to the Member States to use the maximum periods set out in the Return Directive and not provide for shorter detention periods. In addition, the Recommendation calls upon the Member States to use detention "as needed and appropriate" and, if necessary, deviate from the provisions concerning the judicial review of detention and detention conditions, as foreseen for emergency situations under the Return Directive (COM 2017b: recommendations 10a and 10b; Art. 18 RD). In particular, this applies if there are no sufficient detention capacities. The Member States are asked to bring capacities in line with actual needs (COM 2017b: recommendation 10c).

6.3.2 Detention in Germany

In Germany, third-country nationals who are enforceably required to leave the country may be detained as a last resort to enforce their removal. However, detention is not permissible if the person's departure can be enforced by another, less severe means which is sufficient as well (Section 62 subs. 1 first sentence of the Residence Act; see Chapter 5.2.2).

Types of detention

Detention to prepare removal

If persons are to be expelled, for example on the grounds of having committed a criminal offence (Sections 53–56 of the Residence Act), detention to prepare removal may be ordered if a decision on removal cannot be reached immediately and if the removal would be much more difficult or impossible without such detention (Section 62 subs. 2 first sentence of the Residence Act). The length of the detention should not exceed six weeks (Section 62 subs. 2 second sentence of the Residence Act).

Detention in connection with a removal procedure following unauthorised entry or a transfer procedure

The provisions governing detention to secure removal (see below) are applied *mutatis mutandis* (Section 57 subs. 3 of the Residence Act). Detention in connection with a Dublin transfer is also subject to the specific provisions of the Dublin Regulation (Section 57 subs. 2 in conjunction with Sections 62 subs. 2 and 3 and 62a of the Residence Act as well as Art. 28 of the Regulation (EU) no. 604/2013). Detention in connection with a Dublin transfer is admissible only if there is a significant risk of absconding (Art. 28 par. 2 of the Regulation (EU) no. 604/2013; Section 2 subs. 14 of the Residence Act).

Custody to secure departure

In 2015 the ‘Act Redefining the Right to Remain and the Termination of Residence’ created the option to order custody to secure departure. A person who is enforceably required to leave the Federal territory may be taken into custody upon a court order to that effect if the period for voluntary departure is over and s/he has repeatedly omitted to take mandatory action or deceived the authorities about his or her identity and his or her behaviour suggests that s/he will try to make the removal procedure more difficult or impossible (Section 62b subs. 1 of the Residence Act). Thus, the preconditions for ordering custody to secure departure are less strict than those for detention to secure removal. When the custody to secure departure was introduced, its maximum length was four days. This was increased to ten days by the adoption of the ‘Act to Improve the Enforcement of the Obligation to Leave the Country’. The main purpose of the custody to secure departure is to enable collective removals. It is required that removal is indeed possible within the time limit (Hailbronner 2017: 388).

Detention to secure removal

Detention to secure removal serves to enforce the termination of stay if there are no other means to do so (Grote

2014: 18). All grounds for detention to secure removal are listed in Section 62 subs. 3 first sentence of the Residence Act, which states that detention can be ordered if

1. “the foreigner is enforceably required to leave the federal territory on account of his or her having entered the territory unlawfully,
 - 1a. a deportation³⁶ order has been issued pursuant to Section 58a but is not immediately enforceable,
2. the period allowed for departure has expired and the foreigner has changed his or her place of residence without notifying the foreigners authority of an address at which he or she can be reached,
3. he or she has failed to appear at the location stipulated by the foreigners authority on a date fixed for deportation, for reasons for which he or she is responsible,
4. he or she has evaded deportation by any other means or”
5. there is a well-founded suspicion that he or she intends to evade deportation by absconding (risk of absconding; see Chapter 5).

Pursuant to the General Administrative Regulation to Section 62 of the Residence Act, there must be a “reasonable probability to assume that the removal will be impossible unless the foreigner is taken into detention”. If the person concerned credibly asserts that s/he does not intend to evade removal, the order for detention may be exceptionally waived even if all other preconditions are met (Section 62 subs. 3 second sentence of the Residence Act).

Detention to secure removal is not permissible if it is clearly impossible to carry out a removal within the next three months (Section 62 subs. 3 third sentence of the Residence Act). The judge ordering detention shall prepare a scenario which takes into account all circumstances of the individual case (Hailbronner/Thym, no year: 6; Winkelmann 2016: § 62 margin no. 78). The authority which requests detention shall give concrete details on the planned removal and the usual timetable for removals to the country of destination concerned (Marx 2017: 870).

Pursuant to the wording of the law, detention is unlawful if the person concerned is not responsible for the impossibility of the removal. However, several courts have decided that detention may be inadmissible even if s/he is responsible, as detention must not be used as an instrument to enforce cooperation (Hailbronner/Thym, no year: 8). If a person who is enforceably required to leave the Federal territory poses a significant risk to life or limb or important areas of public

³⁶ “deportation” is the term used for removal in the translation of the German Residence Act. It has the same meaning as “removal” as used in the Return Directive (see also EMN/COM 2014: 79).

safety, detention may be ordered even if a removal is not possible within three months (Section 62 subs. 3 fourth sentence of the Residence Act). This new provision was introduced by the ‘Act to Improve the Enforcement of the Obligation to Leave the Country’.

Minors and families with minors may be taken into detention to secure removal only in exceptional cases and only for as long as is reasonable taking into account the well-being of the child (Section 62 subs. 1 third sentence of the Residence Act). In practice, only one family member is taken into detention as a rule; children are usually not detained (see Chapter 8.3).

Length of detention

Detention to secure removal may be ordered for a maximum of six months (Section 62 subs. 4 first sentence of the Residence Act). However, it should not be longer than three months as a rule (see Section 62 subs. 3 third sentence of the Residence Act). The request for detention must contain a concrete and sound forecast about the necessary length of detention; a six-month detention may only be ordered if the removal cannot be carried out within three months for reasons which are the deportee’s fault (Keßler 2016: § 62 margin no. 39). If the detainee hinders his or her removal, the detention may be extended by a maximum of twelve months (Section 62 subs. 4 second sentence of the Residence Act). However, this is admissible only in very exceptional cases, as the constitution contains considerable obstacles to deprivation of liberty (Keßler 2016: § 62 margin no. 41). Since the ‘Act to Improve the Enforcement of the Obligation to Leave the Country’ entered into force, detention may also be extended by twelve months if a removal order (Section 58a of the Residence Act) was issued and the necessary documentation from the country of destination is delayed (Section 62 subs. 4 third sentence of the Residence Act).

While the maximum length of 18 months is in line with the limit set out in the Return Directive (Art. 15 par. 6 RD), it already applied in Germany before the implementation of the Directive. By extending detention in recent legislation, Germany has used an option foreseen by the Directive.

Ordering and monitoring detention

Order

A judicial order is necessary for all types of detention (detention to prepare removal, detention to secure removal, detention in connection with a removal procedure following an unauthorised entry and custody to secure departure). The court may only order detention upon application by the competent administrative authority (Section 417 subs. 1 of the Act on Proceedings in Family Matters and in Matters of

Non-contentious Jurisdiction³⁷). This may be a foreigners authority, a Land police force or the authorities tasked with monitoring cross-border travelling, for example the Federal Police (Grote 2014: 15). Only in exceptional cases may the responsible authority take a person in provisional detention without a prior judicial order; however, a court decision must be obtained as quickly as possible (Section 62 subs. 5 of the Residence Act). The Länder are responsible for executing the detention and have adopted relevant Land acts and provisions to that effect (Grote 2014: 15).

The detention order is usually executed at once; in most cases, the detainee is brought directly from the courtroom to the detention facility. The court examines whether all preconditions for ordering detention are met (see Chapter 6.3.2). This includes an examination of the period for which detention has been requested. However, the court which examines the detention order will not decide on the validity of the return decision, as it does not have jurisdiction in this area. Return decisions and the obligation to return are examined by administrative courts, whereas detention orders and detention examinations come under the purview of ordinary courts, i.e. usually the local court for the district (Section 416 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction).

Examination after issuance of the order

During the period of detention, the responsible foreigners authority shall check whether the preconditions for detention continue to exist or whether they no longer prevail (62.3.0.1 of the General Administrative Regulation to the Residence Act). It shall immediately suspend the execution of detention for up to one week and immediately apply for the revocation of the order if the grounds on which it was based no longer exist (62.3.3 of the General Administrative Regulation to the Residence Act).

If the original detention order runs out, an extension order will need to be requested and issued by a court. The new examination shall take into account the principle that a removal should be carried out as quickly as possible. For example, the authorities are obliged to immediately take measures towards organising the removal, such as procuring travel documents or booking flights (Marx 2017: 860). Moreover, the authorities are obliged to let detainees go if it becomes clear that the removal cannot take place within three months for reasons which are not the deportee’s fault.

Legal remedies against detention

The person to be detained may lodge an appeal against a detention order with the local court. The regional court will

37 BGBl. I p. 2586, 2587.

then decide on the appeal. If the appeal is rejected, the person concerned may lodge an appeal on a point of law with the Federal Court of Justice. However, this is usually only permissible if the case touches upon fundamental legal issues (for more details see Grote 2014: 31).

Detention conditions and detention capacities

The Länder are responsible for executing detention. Detainees are accommodated in specialised detention facilities (Section 62a subs. 1 first sentence of the Residence Act). Until a decision by the European Court of Justice of 17 July 2014, in some Länder the detainees awaiting removal were accommodated in separate wings of regular prisons (Grote 2014: 7). The European Court of Justice decided that a lack of specialised detention facilities in a given Land did not justify accommodating deportees together with regular prisoners. This would be justified only if there were no specialised facilities in Germany at all, which was not the case.³⁸ The 'Act to Improve the Enforcement of the Obligation to Leave the Country' reintroduced the option of accommodating per-

sons who may endanger public security in regular prisons. This applies to persons who pose "a significant risk to life or limb or important areas of public safety" (Section 62a subs. 1 second sentence of the Residence Act).

As a consequence of the decision by the European Court of Justice, several detention facilities and prison wings for deportees had to close, which reduced the number of potential places for detention considerably (Deutscher Bundestag 2016b: 27 et seq.). Following the shutdowns, several Länder initiated cooperations, which is why a number of detention facilities accommodate deportees on behalf of other Länder (Deutscher Bundestag 2016b: 21 et seq.). Since 2015, Baden-Württemberg has opened a new detention facility and North Rhine-Westphalia has transformed a former prison into a specialised detention facility (Ministerium für Inneres, Digitalisierung und Migration 2016; Deutscher Bundestag 2016b: 5). In Bavaria, a new detention facility was opened in Eichstätt on 12 June 2017, replacing the former prison in Mühldorf which was used previously. As Table 6 shows, detention capacity (measured in the number of beds) has been increased in a number of Länder over the course of the year 2017. However, the facility in Eisenhüttenstadt (Brandenburg) has closed for renovation in March 2017 (rbb

³⁸ European Court of Justice cases C-473/13, C-514/13 and C-474/13.

Table 6: Detention capacities, in number of beds, as of 31 December 2016 and 1 August 2017

Land	Location	Capacity as of 31.12.2016*				Capacity as of 1.08.2017				Comments
		Men	Women	Families	Total	Men	Women	Families	Total	
Baden-Württemberg	Detention facility Pforzheim	36	0	0	36	36	0	0	36	Enlargement to 80 places planned, among them places for women and families.
Bavaria	Mühldorf am Inn prison/ since 12.06.2017 detention facility Eichstätt	68	14	0	82	86	10	0	96	The detention facility in Eichstätt opened on 12.06.2017.
Brandenburg	Detention facility Eisenhüttenstadt		24		108	-	-	-	-	The detention facility in Eisenhüttenstadt has been closed since March 2017.
Bremen	Police custody	n/a	n/a	n/a	20	n/a	n/a	n/a	20	
Lower Saxony *	Detention facility in Langenhagen (adminstrated by Hannover prison)	24	6		30	62	6		68	
North Rhine-Westphalia	Detention facility Büren	100	0	0	100	140	0	0	140	There are 5 places available for women in the detention facility in Ingelheim.
Rhineland-Palatinate	Detention facility Ingelheim	28	8	4	40	28	8	4	40	Families: places for couples
Total capacity		256	52	4	416	352	24	4	400	

*Lower Saxony: as of 31.07.2016

Sources: ZUR; SWR 2017; Bayerisches Staatsministerium für Justiz 2017; Breyton/Heimbach 2017; Landtag Nordrhein-Westfalen 2017: 2.

2017), which is why the overall detention capacity has decreased. At present, several Länder are planning to increase their detention capacity or build new facilities for detention (Breyton/Heimbach 2017). Hamburg does not have a detention facility at the moment, but a facility for custody to secure departure has been opened in October 2016. It accommodates 20 persons.

Number of detainees awaiting removal in Germany

Table 7 shows the total number of detainees awaiting removal in the years 2012 to 2016 (as of 31 July).³⁹ The figures for minors do not differentiate between accompanied and unaccompanied minors. Unaccompanied minors are currently not removed, which means that they may only be detained in connection with a removal procedure following an unauthorised entry or a refusal of entry procedure (see Chapter 8.2.2). The figures given in the table are not equivalent to the numbers of actual deportees; they also include persons who were released from detention before the removal or refusal of entry took place.⁴⁰

The total number of persons placed in detention had already declined between 2008 and 2012 (Grote 2014: 24). It decreased considerably in 2013 and even more strongly in 2014 following the closure of several detention facilities and the judgement of the Federal Court of Justice on detention on the grounds of risk of absconding (see Chapter 5.2). This continued in 2015. The number of persons placed in detention until 31 July 2016 indicates that the use of detention has increased again since 2016.

39 The total numbers were calculated on the basis of information provided by the Länder for a parliamentary question to the Federal Government (Deutscher Bundestag 2016b) and for an Ad-Hoc Query of the EMN (EMN 2016). It is possible that persons are counted twice; by the Land ordering the detention as well as by the Land executing it. At the same time, it is possible that in these cases, none of the two Länder counts the person concerned. This can be the case even if detention is executed for another Land by way of administrative assistance. Table 11, in the annex, contains such information if the Länder have provided it for the parliamentary question.

40 For the number of actual removals from detention see Deutscher Bundestag 2016b: 65 et seq.

6.3.3 Alternatives to detention

If an authority requests a detention order, it needs to explain why there is no viable alternative. There are several measures which can be undertaken to prevent absconding during the period for voluntary departure, which must be considered as alternatives (see Chapter 5.2.2; see also Deutscher Bundestag 2016b: 123 et seq.).

6.3.4 Challenges in the context of detention and its alternatives

Representatives of the Länder and the Repatriation Support Centre believe that administrative and legal obstacles to ordering detention are among the most important challenges in this context. A large number of requests for detention orders are rejected, not least because there are strict requirements for such a request (see also SVR 2017: 32 et seq.). The prohibition of announcing removal dates makes it more difficult to prove that a person who is obliged to leave Germany plans to abscond. The Länder also claim that the number of complaints concerning detention has increased. This hampers the practical execution of detention. Administrative challenges may arise from a lack of information given by the foreigners authorities if detention is to be ordered outside the regular working hours of the authorities. However, some foreigners authorities have established on-call services for such cases. Long processing times for asylum applications or subsequent applications filed from detention may also result in detention becoming inadmissible, as may a lack of cooperation on the part of the countries of destination or delays during the issuance of travel documents by their diplomatic missions in Germany. Simply getting detainees to specialised detention facilities may present a challenge as well. And finally, the small number of places, in particular due to the shutdown of several facilities (see above), and the lack of detention facilities near airports for custody to secure departure are mentioned as challenges. Nevertheless, the jump in asylum applications and the resultant increase in the number of persons who are obliged to leave Germany in 2015 and 2016 have not led to unforeseen burdens for individual prisons or administrative or judicial staff. It has not been necessary to deviate from the normal procedure.

Table 7: Persons placed in detention 2012 – 2016

Year	2012*	2013*	2014*	2015**	2016 - until 31.07.2016 **
Adult men	5,094	4,300	1,905	n/a	n/a
Adult women	339	275	150	n/a	n/a
Minors	42	16	2	n/a	n/a
Total	5,475	4,591	2,057	1,327	1,255

* Source: Deutscher Bundestag 2016b: 10ff. For figures on the individual Länder, see table 11 in the annex.

** Source: EMN 2016.

The groups mentioned above think that using alternatives to detention and examining all options ahead of requesting an order for detention is a good way to deal with these challenges. For example, social benefits may be cut or limited to benefits in kind, or the freedom of movement of the persons concerned may be restricted (see Chapter 5.2.2). Moreover, taking only one family member into detention even though several are obliged to leave the country has proven to be a useful measure (see Chapter 8.3.2).

Civil society organisations complain that persons who are obliged to leave the country are often detained in an unlawful way, with the unlawfulness being established by the courts only after the removal had taken place (Diakonie Hessen 2017). Organisations such as PRO ASYL or Diakonie have therefore called for abolishing detention and for improving the conditions of detention (Pelzer/Sextro 2013: 57).

So far, no major challenges or good practices have shown up with regard to custody to secure departure. The legal basis for custody to secure departure entered into force on 1 August 2015 (see Chapter 2.2.2), and so far, only one specialised detention facility was opened at Hamburg in October 2016. According to a press report from spring 2017, it has not yet been used to a large extent (Popien/Heinemann 2017). However, several Länder are planning to establish facilities for custody to secure departure, for example Hessen (von Bebenburg 2017) and Saxony (MDR 2017).

7 Legal remedies against removals

7.1 Provisions set out in the Return Directive and the Commission Recommendation

All persons affected by a return decision are entitled to an effective remedy to appeal against the decision, against an entry ban or against removal itself or to have such measures reviewed (Art. 13 par. 1 RD). The reviewing authority must have the power to temporarily suspend the enforcement of the removal (Art. 13 par. 2 RD).

The Commission Recommendation encourages Member States to restrict the procedural guarantees and remedies as much as possible. For example, administrative hearings conducted by the authorities should be merged in one procedural step to the largest possible extent (for example hearings during the asylum procedure, concerning the return decision or concerning an entry ban; COM 2017b: recommendation 12a). Deadlines for lodging appeals against return decisions should be kept as short as possible, and appeals against return decisions should not prevent removal, if possible (COM 2017b: recommendations 12b and 12c). If possible, the Member States should assess the respect of the principle of non-refoulement only once before a removal (see Chapter 3.2.4; COM 2017b: recommendation 12d).

7.2 Implementation in Germany

7.2.1 Hearing

Asylum procedure

The asylum procedure usually provides for only one hearing, during which the person concerned shall provide the facts which might justify protection and which might preclude removal to a specific country (Section 25 of the Asylum Act; see Chapter 3.2.4). During the asylum procedure hearing, the applicant may also present reasons why an entry ban, which might be issued later, should be shortened (see Chapter 9). If the Federal Office for Migration and Refugees rejects the asylum application and finds that there are no obstacles to removal pursuant to Section 60 subs. 5 and 7 of the Residence Act, a second hearing is not necessary before a removal warning is issued (Section 34 subs. 2 of the Asylum Act). Under certain circumstances, a second hearing may be useful and indeed necessary, namely if the results of the asylum procedure hearing are no longer valid due to a fundamental change in circumstances which are material to

the removal or if a long time has passed between the hearing and the rejection (Bergmann 2016: § 34 margin no. 12; see also Hörich 2015: 261).

Obligation to leave for other reasons

From a legal vantage point, there is no necessity of a hearing before the issuance of a removal warning by the foreigners authority. The persons concerned are obliged to put forward on their own initiative any circumstances in their favour which are not evident or known, such as circumstances which might be an obstacle to removal. As a rule, any such facts only need to be considered as long as a removal warning can still be subject to appeal (Section 59 subs. 4 of the Residence Act; see Chapter 3.2.4). In all other circumstances, the appeal procedure before a court serves to safeguard the foreigner's rights (see Chapter 7.2.2).

7.2.2 Legal remedies against a return decision

Competent authority

In principle, any person affected by an administrative act can lodge an objection against this administrative act (Sections 68 et seq. of the Code of Administrative Court Procedure). If this objection is rejected, the person can lodge an action with the competent administrative court (Section 74 of the Code of Administrative Court Procedure). The competent authority and the procedure to follow depend on the authority which has issued the return decision:

It is not possible to lodge an objection against decisions taken by the Federal Office for Migration and Refugees in the framework of the asylum procedure (Section 11 of the Asylum Act). Instead, applicants may directly lodge an action with the competent administrative court. The competent court must be mentioned in the information about available legal remedies contained in the decision. In case of a removal warning issued by a foreigners authority, the relevant Land law will spell out whether the person concerned can lodge an objection with the competent authority or only lodge an action with a court (59.0.1 of the General Administrative Regulation to the Residence Act). And finally, there is also the possibility to apply for an injunction against the removal as such. This remedy objects to the legality of the procedure of removal (Hailbronner 2017: 391). The person concerned must apply for an interim order to the competent court (Section 123 of the Code of Administrative Court Procedure).

Deadlines

As a rule, a court action against a rejection of an asylum application must be lodged within two weeks; if the application was rejected as manifestly unfounded, this period is shortened to one week (Section 74 subs. 1 and Section 36 subs. 3 first sentence of the Asylum Act).

Objections and court actions against a removal warning issued by the foreigners authority may be lodged within one month with the competent foreigners authority or the competent administrative court (Sections 68 et seq. of the Code of Administrative Court Procedure; Section 42 subs. 1 of the Code of Administrative Court Procedure).

There are no deadlines for applying for an injunction against a removal (Hailbronner 2017: 391).

Suspensive effect of court actions

Court actions brought against a rejection of an asylum application have a suspensive effect in most cases. This means that while the obligation to leave Germany remains in effect, it may not be enforced while the appeal is pending (Section 75 subs. 1 of the Asylum Act in conjunction with Section 38 subs. 1 of the Asylum Act; see Hailbronner 2017: 391). If, however, the asylum application was rejected as manifestly unfounded, the court action will not have a suspensive effect. In order to prevent an enforcement, the affected person will need to request an order for a suspensive effect pursuant to Section 80 subs. 5 of the Code of Administrative Court Procedure at the same time as s/he lodges a court action against the rejection of the asylum application (application for temporary relief; see Hailbronner 2017: 460). The same applies to removal orders to a safe third country or to a Member State which is responsible for the asylum procedure pursuant to the Dublin Regulation (Section 34a subs. 2 of the Asylum Act). Court actions brought against the withdrawal or revocation of a right to asylum, of refugee status, of subsidiary protection or of removal bans generally have a suspensive effect (Section 75 subs. 1 of the Asylum Act in conjunction with Sections 73, 73b and 73c of the Asylum Act).⁴¹

The suspensive effect of any legal remedies against removal warnings issued by foreigners authorities will depend on the law of the relevant Land (see 59.0.1 of the General Administrative Regulation to the Residence Act). Pursuant to the law of most Länder, remedies against enforcement measures, such as a removal warning, do not have a suspensive effect (see Section 80 subs. 2 second sentence of the Code on Administrative Court Procedure; Hailbronner 2017: 390).

However, the affected person may request an order to reconstitute the suspensive effect (Section 80 subs. 5 of the Code on Administrative Court Procedure). If this request is granted, the suspensive effect will remain in place until the court decision becomes incontestable (Section 80b of the Code on Administrative Court Procedure).

Legal remedies against removals following an unauthorised entry usually do not have a suspensive effect either, as these tend to be non-postponable measures by police enforcement officers (Section 80 subs. 2 first sentence no. 2 of the Code on Administrative Court Procedure).⁴²

7.2.3 Legal remedies against a removal order

Removal orders may be enforced immediately even if no removal warning has been issued (Section 58a subs. 1 second sentence of the Residence Act). They are “a specific measure of residence termination, which is characterised by particular speed and limited legal protection” (Hailbronner 2017: 392). Any actions against removal orders must be brought before the Federal Administrative Court (Section 50 subs. 1 no. 3 of the Code on Administrative Court Procedure). The person concerned may apply for temporary relief within seven days, and the removal may not be enforced until this period has expired or until a court has decided on the application (Section 58a subs. 4 third sentence of the Residence Act).

⁴¹ For exceptions to this rule, in particular in the case of a withdrawal or revocation on the grounds of serious offences, see Section 75 subs. 2 of the Asylum Act.

⁴² For more details see Hailbronner 2017: 364 et seq.

8 Return of vulnerable persons and dealing with medical impairments

8.1 Definition of ‘vulnerability’ in the context of return policy

8.1.1 Provisions of the Return Directive

‘Vulnerable persons’ within the meaning of the Return Directive are minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (Art. 3 par. 9 RD). Moreover, the Member States may postpone removal owing to the affected person’s physical or psychological state (Art. 9 par. 2 RD).

8.1.2 Implementation in Germany

German law contains specific provisions concerning forced returns of minors and families (see Chapters 8.2 and 8.3) and removal bans on medical grounds (see Chapter 8.4). In addition, there are specific provisions for victims of human trafficking. However, there is no legal definition of ‘vulnerability’ in the context of a termination of residence. All persons who are not yet 18 years old are minors under German law.⁴³ The REAG/GARP programme for return and start-up assistance does not include vulnerability as a criterion for a right to assistance either. However, victims of human trafficking may apply regardless of their residence status and are exempt from several exclusion criteria (EMN/BAMF 2017: 58). In addition, there are specific provisions for minors, pregnant women and ill persons (IOM 2017: 7 et seq.; see Chapters 8.2 and 8.4). In addition to REAG/GARP and StarthilfePlus, there are numerous return programmes run by the Länder or local organisations, some of which include or specifically address vulnerable persons (see Grote 2015).

8.2 Voluntary and forced returns of minors

8.2.1 Provisions set out in the Return Directive and the Commission Recommendation

The Member States must take due account of the best interests of the child when implementing the Return Directive (Art. 5 letter a; Recital 22 RD). Art. 10 RD obliges the Member States to make sure that unaccompanied minors will be returned to a member of their family, a nominated guardian or adequate reception facilities in the state of return before a removal.

The Commission Recommendation encourages Member States to establish clear rules on the residence status of minors, i.e. to either issue them with a return decision or grant them a right to stay (COM 2017b: recommendation 13a). In order to determine the best interests of the child, the child shall be heard and the guardian of an unaccompanied minor is to be duly involved (COM 2017b: recommendation 13d). A return to the country of origin and family reunification in the country of origin should be taken into account as an option (COM 2017b: recommendation 13b). The Member States should develop and implement reintegration programmes for unaccompanied minors in order to make returns easier (COM 2017b: recommendation 13c).

8.2.2 Implementation in Germany

Determining the best interests of the child when issuing return decisions

Before launching concrete removal measures, the foreigners authority must check whether minors must be accompanied on their travels and ensure that they are handed over to a family member, a person possessing the right of care and custody or an appropriate reception centre in the country of origin (Section 58 subs. 1a of the Residence Act).⁴⁴ If that is not the case, removal is impossible in law and the foreigners authority has to issue a suspension of removal

⁴³ Until the Act on the Acceleration of Asylum Procedures entered into force on 24 October 2015, minors aged 16 and older were regarded as legally capable within the framework of the asylum procedure. The amendment of the law lifted this threshold to 18 years.

⁴⁴ This provision was included in the Act implementing the Return Directive.

pursuant to Section 60a subs. 2 of the Residence Act (Müller 2014: 31). The examination procedure may involve the German diplomatic mission to the country of return, and it usually also involves the competent youth welfare office or the guardian of the minor (Deutscher Bundestag 2016a: 82). However, in practice it is often difficult to contact persons possessing the right of care and custody in the country of destination.

Minors who live together with their parents and whose asylum application was rejected may not be removed without their parents if the latter are entitled to protection or benefit from protection against removal (Hailbronner 2017: 397). Ahead of Dublin transfers of families with small children to Italy, the authorities have to obtain a commitment from their Italian counterparts to provide all family members with accommodation.⁴⁵

Protection against removal for unaccompanied minors

As a rule, the removal of newly arrived unaccompanied minors is suspended as soon as the competent youth welfare office has sent the necessary data to the foreigners authorities. This is independent from the minor's filing or intending to file an asylum application (Müller 2014: 30).

Several Länder refrain from removing unaccompanied minors as a principle (Deutscher Bundestag 2016b: 82 et seq.). In 2016, no unaccompanied minors were removed to their countries of origin. However, 620 unaccompanied minors were refused entry at the border and 29 were removed following an unauthorised entry (Deutscher Bundestag 2017c: 29). 872 minors (including accompanied minors) were transferred in the framework of the Dublin procedure (Deutscher Bundestag 2017c: 13).⁴⁶ 170 unaccompanied minors returned to their countries of origin under the REAG/GARP programme in 2016.

Beyond the general rules on a suspension of removal or a residence title for humanitarian reasons (see Chapter 3.2.6), there are specific provisions for young people and young adults. These include – provided that further preconditions are met – an entitlement to a suspension of removal if they have begun a vocational qualification in a state-recognised occupation and to a residence permit if they are employed by the enterprise which has trained them or find employment with another enterprise (Sections 60a subs. 2 fourth sentence and 18a subs. 1 of the Residence Act; see EMN/BAMF 2017: 65). Young people and young adults aged below

21 should be issued with a residence permit if they have lived in Germany for at least four years and successfully attended school or begun a vocational qualification, provided that further preconditions are met (Section 25a subs. 1 of the Residence Act).

Voluntary return

While minors may avail themselves of the reintegration programmes supported at the Federal level, these programmes are not directly addressed at them (for an overview see Grote 2015: 41 et seq.). Minors can be supported under the REAG/GARP programme to promote voluntary returns, provided that “at least one parent or guardian consents to the transport in writing. Minors must be met at the destination by a parent or a person who has been authorised by the parents or a guardian in writing. Unaccompanied minors may be granted reception assistance, which includes meeting the minor at the gate, supporting him or her during the entry controls and handing him or her over to the person authorised to meet him” (IOM 2017).

8.3 Detention of minors and families

8.3.1 Provisions set out in the Return Directive and the Commission Recommendation

Pursuant to the Return Directive, minors and families with minors may be detained only as a measure of last resort and for the shortest appropriate period of time (see Art. 17 par. 1 RD).

The Commission Recommendation states that the Member States should not preclude in their national legislation the possibility to place minors in detention and use this option where it is strictly necessary to ensure a return (COM 2017b: recommendation 14).

8.3.2 Implementation in Germany

Minors and families with minors may be taken into detention only in exceptional cases and only for as long as is reasonable taking into account the well-being of the child (Section 62 subs. 1 third sentence of the Residence Act). Particular attention is paid to the situation of vulnerable persons with regard to detention (Section 62a subs. 3 second sentence of the Residence Act). If minors are taken into detention, the needs of persons of their age shall be taken into account in accordance with the provisions of the Return Directive (Section 62a subs. 3 first sentence of the Residence Act; Art. 17 RD). If there are doubts about the age of the person concerned, the court which issues the order for detention shall have to resolve them ex officio (Marx 2017: 859). If several members of a family are detained, they shall be

⁴⁵ Federal Constitutional Court of 17 September 2014 – 2 BvR 939/14; ECHR, *Tarakhel vs. Switzerland*, no. 29217/12.

⁴⁶ Dublin transfers of minors are only permitted if they are in the best interests of the child. Generally, minors are transferred only if they have relatives living in the destination state (Art. 8 of the Regulation (EU) no. 604/2013).

accommodated separately from other detainees awaiting removal and guaranteed adequate privacy (Section 62a subs. 1 third and fourth sentences of the Residence Act). The General Administrative Regulation to the Residence Act contains further provisions:

“As a rule, minors aged under 16, foreigners aged above 65, pregnant women and mothers to whom legal maternity protection provisions apply shall not be taken into detention. If the parents of the minor foreigner are not resident in Germany, the foreigners authority shall contact the responsible youth welfare office with regard to the accommodation of the foreigner until his deportation (see Section 42 subs. 1 second sentence of the Eighth Book of the German Social Code). Minors whose asylum application has been rejected shall remain at their place of accommodation until their deportation. In the case of families with minor children, detention shall, as a rule, only be requested for one parent” (62.0.5 of the General Administrative Regulation to the Residence Act; concerning the practice in the different Länder see Deutscher Bundestag 2016b: 79 et seq.).

The Länder are responsible for the implementation of these provisions and for the conditions of detention. Most Länder provide that all potential alternatives must be examined jointly with the youth welfare office before detention is ordered (Deutscher Bundestag 2016: 81).

8.4 Return of people with medical impairments and medical obstacles to removal

8.4.1 Provisions set out in the Return Directive and the Commission Recommendation

Pursuant to the Return Directive, the Member States shall take into account the physical state and mental capacity of the persons concerned and may postpone a removal for medical reasons (Art. 9 par. 2 letter a RD).

However, the Commission Recommendation emphasises that it is essential to enforce the return of irregularly staying third-country nationals and that the Member States should take measures to prevent “behaviour aimed at hampering or preventing return, such as false new medical claims” (COM 2017b: 4). It therefore recommends to the Member States to prevent potential abuses of medical claims for example by having the competent authorities provide medical personnel for “an objective and independent opinion” (COM 2017b: recommendation 9b).

8.4.2 Implementation in Germany

Country-specific removal bans on medical grounds

A substantial, concrete danger to a person’s life and limb or liberty in the return state will result in a country-specific obstacle to removal (Section 60 subs. 7 first sentence of the Residence Act). Such a substantial concrete danger for health reasons exists in the case of life-threatening or serious illness which would significantly worsen upon the removal being carried out (Section 60 subs. 7 second sentence of the Residence Act). In such cases, removal is to be suspended.

The Federal Office for Migration and Refugees is responsible for examining such country-specific removal bans in the framework of the asylum procedure (Section 24 subs. 2 and Section 31 subs. 3 of the Asylum Act). If a person invokes a country-specific removal ban outside the asylum procedure, the competent foreigners authority shall take the relevant decision, but shall consult the Federal Office for Migration and Refugees (Section 72 subs. 2 of the Residence Act).

The Asylum Package II, which entered into force on 17 March 2016, amended the provisions for the examination. Pursuant to the new rules, it is not necessary that medical care in the country of destination be equivalent to the standard in the Federal Republic of Germany. Sufficient medical care is assumed to exist if it is guaranteed only in parts of the state of destination (Section 60 subs. 7 third and fourth sentences of the Residence Act).

Unfitness for travel as a domestic obstacle to enforcement

Serious illness may be a domestic obstacle to enforcement if the affected person is not fit for travel (Marx 2017: 808). Medical obstacles to enforcement shall be determined by the competent foreigners authority; they exist if there is a concrete danger that the affected person’s state of health will seriously deteriorate or even become life-threatening due to the removal and if it is not possible to take certain measures to exclude or alleviate this risk” (Marx 2017: 809). Since the Asylum Package II entered into force, deportees are as a rule assumed to be fit for travel and must provide a medical certificate to prove that they are not fit for travel for health reasons. This medical certificate shall in particular document the factual circumstances on the basis of which the professional assessment was made, the method of establishing the facts, the specialist medical assessment of the disease pattern (diagnosis), the severity of the illness and the consequences which will, based on the medical assessment, presumably result from the situation which arose on account of the illness (Section 60a subs. 2c of the Residence Act). The medical certificate must be issued by a licensed physician (Deutscher Bundestag 2016d: 19). The person concerned must immediately submit this certificate to the competent authority. If

s/he does not do so, the authority is permitted not to take into account the medical claims, unless s/he was prevented, through no fault of his or her own, from obtaining such a certificate or there is other factual evidence for the existence of a life-threatening or serious illness which would significantly worsen on account of the removal. If the person concerned submits a certificate and the authority thereupon orders a medical examination, the authority shall be entitled not to give consideration to the illness as submitted if the person concerned does not comply with the order of a medical examination without sufficient reason (Section 60a subs. 2d of the Residence Act; see also Marx 2017: 809).

When the Asylum Package II was adopted, the opposition criticised that the legal requirement of a medical certificate precluded submitting expert opinions by psychologists. This presented a problem in the case of traumatised persons, who often obtained a psychotherapeutic - and not a medical - diagnosis or treatment (see Deutscher Bundestag 2016b: 12). The Federal government stated that under the new law, it was still possible to consult and involve psychotherapists in the preparation of the medical certificate (Deutscher Bundestag 2016b: 13).

Even if the affected persons were not deemed unfit for travel, several removals were cancelled on health grounds. In 2016, this occurred in 74 cases in which persons were to be removed by plane (Deutscher Bundestag 2017c: 43).

Pregnancy

Pregnancy as such is not an obstacle to removal. However, several courts have decided that during the period in which legal maternity protection provisions apply (see Section 3 subs. 2 and Section 6 subs. 1 of the Maternity Protection Act⁴⁷) and in case of high-risk pregnancies, the expectant mother is unfit for travel, which is why removals cannot be enforced (Bauer 2016: § 61 margin no. 23).⁴⁸ In addition, removals by air transport “are as a rule impossible after the 36th week of pregnancy, as airlines usually transport pregnant women only after an examination by an aviation medical examiner.”⁴⁹ Under the REAG/GARP programme, it is usually impossible to depart after the 32nd week of pregnancy (IOM 2017: 7).

Supply of medicine during the return procedure and in the country of return

The foreigners authorities are responsible for medical care during the removal procedure and possibly after the arrival in the country of destination. Practices may vary depending on the competent Land. As a rule, medical staff and necessary medicine are supplied (see, for example, Niedersächsisches Ministerium für Inneres und Sport 2016: 4.1.3). Deportees may also be registered for medical care at their arrival in the country of destination (Deutscher Bundestag 2016c: 7). The German diplomatic mission to the country of destination will take care of this in consultation with the destination country’s competent authorities.

In the framework of REAG/GARP assisted returns, expenses for medical staff during the journey and necessary additional expenses for the transport may be paid. In addition, as a “humanitarian measure, medicine may be supplied in kind for up to two months after the return, provided that this medicine is vital or necessary to prevent serious illness” (IOM 2017: 4 et seq.).

8.5 Challenges in connection with returns of persons with health problems

There are no reliable figures on the number of removals which are suspended or not enforced for health reasons (see Lohse/Staib 2016).

According to a report by the Return Working Group of the Federal government and the Länder, medical claims are a major challenge for the competent authorities (UAG Vollzugsdefizite 2015: 15). The new provisions of the Asylum Package II aim to counteract any abuse of medical claims (Lohse/Staib 2016). The Federal government writes in its reasoning for the law that, pursuant to the amendment, psychological illnesses such as post-traumatic stress disorder (PTSD) no longer are an obstacle to return (Deutscher Bundestag 2016d: 18), while clarifying in another document that the changes “will not change anything about obstacles to removal in substance” (Deutscher Bundestag 2016c: 16). Difficulties also arise from the fact that psychological illnesses are often difficult to diagnose and experts may arrive at different results in some cases (Deutscher Bundestag 2016c: 13). According to Länder reports to the Federal government, “there are large numbers of certificates issued by the same doctors which declare the holders unfit for travel. The reasons are often the same or the certificates do not include sufficient reasoning.” (Deutscher Bundestag 2016b: 14).

The German Federal Chamber of Psychotherapists (BptK) agrees that psychological illnesses are often difficult to identify, but cautions that “refugees often [...] suffer from

47 Act on the Protection of Gainfully Employed Mothers, BGBl. I p. 2318.

48 See, for example, Administrative Court of Oldenburg, decision of 29 January 2013 – 11 B 37/13; Administrative Court of Schwerin, decision of 2 May 2014 – 3 B 357/14 As.

49 Administrative Court of Oldenburg, decision of 29 January 2013 – 11 B 37/13.

psychological illnesses as well.” In particular, the Chamber regards PTSD as a serious and life-threatening illness (BPtK 2016: 3). According to the Chamber, the accelerated asylum procedure introduced in 2016 makes it considerably more difficult to diagnose psychological illnesses (BPtK 2016: 4). The president of the German Medical Association argues that the experts should be sufficiently qualified and be granted adequate time for a diagnosis, which he does not believe to be the case at the moment (Staib 2016).

9 Entry bans

9.1 Provisions set out in the Return Directive and the Commission Recommendation

Art. 11 par. 1 of the Return Directive obliges Member States to issue an entry ban against third-country nationals who have not been granted a period for voluntary departure or who have not complied with their obligation to return. However, an entry ban may also be issued in other cases (Art. 11 par. 1 RD). The maximum length of the entry ban is five years, but exemptions are possible. The length of the entry ban may exceed five years if the person concerned represents a serious threat to public order, public security or national security (Art. 11 par. 2 RD). On the other hand, Member states must consider lifting an entry ban if a person complies with the return decision (Art. 11 par. 3 RD). In addition, the Return Directive gives Member States further leeway to lift or suspend the entry ban, for example for humanitarian reasons or in certain categories of cases. Victims of trafficking in human beings who have been granted a residence permit in return for their cooperation in a criminal procedure (see Chapter 3.2.6) may not become subjects of an entry ban (Art. 11 par. 3 RD). The entry ban does not preclude the right of applying for asylum or international protection; third-country nationals may not be hindered from entering the European Union if they claim that they need refugee protection (Art. 11 par. 5 RD).

The Commission Recommendation contains several proposals for the effective enforcement of entry bans. Entry bans should not enter into force until the day of the actual departure to ensure their longest possible duration (COM 2017b: recommendation 24a). In addition, entry bans should be systematically entered into the Schengen Information System (SIS; COM 2017b: recommendation 24c). And finally, provided that the principle of proportionality is respected, an entry ban may also be issued if the illegal stay is discovered during an exit check (COM 2017b: recommendation 24d).

9.2 Implementation in Germany

Table 8 provides an overview of the grounds for imposing an entry ban under the Return Directive and illustrates whether these grounds apply under German law as well.

The entry ban is called a “ban on entry and residence” in the Residence Act (Section 11 of the Residence Act). Persons on whom it was imposed may not enter the Federal territory and may not be issued with a residence title, not even if they are entitled to one by law (Section 11 subs. 1 of the Residence Act). A ban on entry and residence is automatically imposed against persons who have been expelled or removed, regardless of whether a period for voluntary departure has been granted. If a person has not voluntarily left

Table 8: Grounds for imposing a ban on entry and residence

Reasons to impose an entry ban	Yes/No	Notes
Risk of absconding (Art. 11 par. 1a in conjunction with Art. 7 par. 4 RD)	No	
Risk for public policy or security or national security (Art. 11 par. 1a in conjunction with Art. 7 par. 4 RD)	Yes	If a person is expelled for these reasons, a ban on entry and residence will be imposed (Section 11 subs. 1 of the Residence Act). A serious threat to public order or security may also lead to an extension of the entry ban beyond five years to up to ten years (Section 11 subs. 3 first and second sentences of the Residence Act).
Rejection of a residence title as manifestly unfounded or fraudulent (Art. 11 par. 1a in conjunction with Art. 7 par. 4 RD)	Yes	If an asylum application by an applicant from a safe country of origin is rejected as manifestly unfounded, an additional entry ban may be imposed (Section 11 subs. 7 first sentence no. 1 of the Residence Act).
Obligation to leave the country not complied with (Art. 11 par. 1b RD)	Yes	In the cases of removal or expulsion, an entry ban will always be imposed (Section 11 subs. 1 of the Residence Act). If a person leaves the country voluntarily, but after the period for voluntary departure has expired, an entry ban may be imposed if the person is responsible for not departing and if the period for voluntary departure was exceeded significantly (Section 11 subs. 6 first sentence of the Residence Act).
Other	Yes	An entry ban may be ordered upon discretion if a subsequent or secondary application was repeatedly rejected as inadmissible.

Germany during the allotted period, a ban on entry and residence may be imposed against him or her (Section 11 subs. 6 first sentence of the Residence Act). That means that in this case, even persons who have voluntarily left Germany may be subject to an entry ban (BAMF 2016). An additional ban on entry and residence may be imposed if the asylum application of a person from a safe country of origin was rejected as manifestly unfounded or if a secondary or subsequent application has repeatedly not led to a follow-up asylum procedure (Section 11 subs. 7 first sentence nos. 1 and 2 of the Residence Act). This option was introduced in 2015 (BAMF 2016). The measure aimed “to reduce the number of asylum applications from nationals of the safe countries of origin in the western Balkans, as such applications are rejected as manifestly unfounded ex officio” (EMN/BAMF 2016a: 47).

9.2.1 Responsibility for ordering and implementing entry bans

If the Federal Office for Migration and Refugees rejects an asylum application, it also decides on the length of the entry ban. The foreigners authorities are then responsible for enforcing it. If the asylum application of an applicant from a safe country of origin is rejected as manifestly unfounded or if no second or subsequent procedure is conducted, the Federal Office for Migration and Refugees itself will order the ban on entry and residence.

9.2.2 Length of entry bans

Table 9 provides an overview of the length of entry bans according to the grounds for imposing them. The exact length of the entry ban is determined by the competent authority at its discretion (Section 11 subs. 3 first sentence of the Residence Act). The decision shall take into account the reasons presented by the affected person at the hearing (see Chapter 7.2.1). In general, a ban on entry and residence may be imposed for a maximum of five years (Section 11 subs. 3 second sentence of the Residence Act). It is usually imposed for 30 months if an asylum application was rejected and for 36 months if a subsequent or secondary application was rejected. However, these are merely guidelines from which the authorities can deviate in individual cases. If an asylum application is rejected as manifestly unfounded, the maximum length of the additional entry ban is usually one year if it is imposed for the first time (Section 11 subs. 1 fifth sentence of the Residence Act). For repeat impositions or if a secondary or subsequent procedure is repeatedly not initiated, the maximum period is three years (Section 11 subs. 7 sixth sentence of the Residence Act). If certain circumstances of the case call for particular protection, the length of the entry ban may be shortened at the discretion of the competent authority. This can be the case if imposing an entry ban over a long period of time would mean an undue hardship - for example if family members of the affected person reside in

Table 9: Overview of bans on entry and residence

Situation	Maximum length	Exceptions/discretion	Legal basis
Departure not within the allotted period	Max. 1 year for the first time; afterwards max. 3 years	At the discretion of the foreigners authority; not imposed if a person's departure was hindered by circumstances beyond his or her control or if the departure period was only exceeded insignificantly;	Section 11 subs. 6 of the Residence Act
Asylum application rejected as manifestly unfounded	Max. 1 year for the first time; afterwards max. 3 years	May be lifted or shortened at the authorities' discretion (Section 11 subs. 4 of the Residence Act). This entry ban is ordered in addition to the ban on entry and residence pursuant to Section 11 subs. 1 of the Residence Act.	Section 11 subs. 7 first sentence no. 1 of the Residence Act
Subsequent or secondary application repeatedly rejected as inadmissible	Max. 3 years	May be lifted or shortened at the authorities' discretion (Section 11 subs. 4 of the Residence Act)	Section 11 subs. 7 first sentence no. 2 of the Residence Act
Expulsion, removal	Max. 5 years	May be lifted or shortened at the authorities' discretion (Section 11 subs. 4 of the Residence Act)	Section 11 subs. 3 first and second sentences of the Residence Act
Expulsion after sentence for a criminal offence	Max. 10 years	May be lifted or shortened at the authorities' discretion (Section 11 subs. 4 of the Residence Act)	Section 11 subs. 3 second and third sentences of the Residence Act
Serious threat to public security and order	Max. 10 years	May be lifted or shortened at the authorities' discretion (Section 11 subs. 4 of the Residence Act)	Section 11 subs. 3 second and third sentences of the Residence Act
Expulsion on the grounds of a crime against peace, a war crime or a crime against humanity; removal order pursuant to Section 58a of the Residence Act	No time limit	Supreme Land authority may permit exceptions in individual cases	Section 11 subs. 5 of the Residence Act

Germany or if the person has the right of care and custody for a minor residing in Germany or in case of unaccompanied minors or elderly people.

If a person was expelled on the grounds of a criminal conviction or if s/he represents a serious threat to public security and order, the maximum length may be exceeded (Section 11 subs. 3 second sentence of the Residence Act); in this case, the maximum length should be ten years (Section 11 subs. 3 fourth sentence of the Residence Act). This applies, for example, if a person was sentenced for criminal offences, is a member of a terrorist association or has publicly incited to violence (see Section 54 of the Residence Act). In case of a removal order or a crime against peace, a war crime or a crime against humanity, no time limit will be applied as a rule (Section 11 subs. 5 of the Residence Act).

9.2.3 Entry into force and enforcement of entry bans

The ban on entry and residence pursuant to section 11 subs. 1 of the Residence Act takes effect by law as soon as the third-country national is removed or leaves Germany due to an expulsion. Therefore, the ban does not need to be ordered explicitly (for example in a rejection of an asylum application); only the time limit must be set. If the irregular stay is detected only upon exit from Germany, no entry ban is imposed, as no return decision is usually issued (see Chapter 3.2.5). However, if an additional ban on entry and residence is imposed because an asylum application was rejected as manifestly unfounded or because a subsequent or secondary application failed repeatedly, the ban will enter into force as soon as the decision in the asylum procedure becomes valid (Section 17 subs. 7 second sentence of the Residence Act). Its validity will not depend on the person's having voluntarily left the country.

9.2.4 Entry in the Schengen Information System

Entry bans imposed on the grounds of public security and order or national security must be entered into the Schengen Information System (SIS) by the Schengen Member States. If entry bans are imposed due to an expulsion, refusal of entry or removal, the Member States may make an entry, but are not obliged to do so (Art. 24 par. 2 and 3 of the SIS II Regulation⁵⁰). All bans on entry and residence imposed by German authorities are entered into the SIS. There is no entry in the passport of the person who is obliged to leave the country (BAMF 2016). The persons concerned are also entered in the German police information system INPOL and in the Central Register of Foreigners. The entry is usually ordered by the competent foreigners authority and made by the competent Land Office of Criminal Police.

9.2.5 Consequences of an entry ban

A ban on entry and residence means that the person against whom it was imposed may not enter Germany and may not be issued with a residence title (Section 11 subs. 1 of the Residence Act). If s/he nevertheless enters Germany, this is classified as unlawful entry (Section 14 subs. 1 no. 3 of the Residence Act). However, there is one exception: the granted temporary entrance (Section 11 subs. 8 of the Residence Act), which allows the person concerned to enter Germany as an exception and for a short stay if his or her presence is required for compelling reasons or if the refusal of permission would constitute undue hardship. The breach of an entry ban is a criminal offence which may be punished by up to three year's imprisonment or a fine; the attempt is equally punishable (Section 95 subs. 2 no. 1 and subs. 3 of the Residence Act).

⁵⁰ Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

Table 10: Practical challenges concerning the implementation of entry bans

Challenges in connection with entry bans	Yes/No/In some cases	Reasons
Compliance with entry bans on the part of the third-country national concerned	In some cases	<ul style="list-style-type: none"> Use of fake or false documents for entry It is not always detectable if entry takes place via a Schengen border (EMN 2014)
Monitoring of the compliance with entry bans	In some cases	<ul style="list-style-type: none"> Beginning of the period of validity difficult to set if there is no proof of departure (e.g. spontaneous voluntary departure without notification; no surrender of border crossing certificate)
Cooperation with other Member States in the implementation of entry bans	In some cases	<ul style="list-style-type: none"> Non-entry of entry bans in SIS by other Schengen states
Cooperation with the country of origin in the implementation of entry bans	No	

10 Conclusion

The impact and importance of European provisions for German return policy

Depending on the area of policy, the Return Directive had different impacts on German return policy. Key changes took place concerning the period for voluntary return, the definition of a “risk of absconding”, in particular with regard to ordering detention, the implementation of detention and the provisions governing entry bans. In contrast, no or only minor amendments were required concerning the issuance of the return decision or removal warning, legal remedies and the treatment of vulnerable persons or persons with health issues. Several of the most important changes in practice occurred only after the implementation of the Directive and stem from European or national judgments, in particular in the area of detention to secure removal and entry bans. Moreover, the use of EU travel documents has risen since 2015, even though such documents are so far used only for a few countries. The comparison of the Commission Recommendations and the national provisions in Germany has shown that in some areas, the European Commission recommends a more restrictive approach than the one currently pursued by Germany. In other areas, the recommendations are already in line with the current provisions, for example as regards the merger of removal warnings and authorities’ decisions about an obligation to leave.

In the area of return promotion and voluntary returns, European law does not have a major impact on German return policy. In contrast, there are more detailed European provisions for forced returns and detention to secure removal, which restrict the leeway for individual national provisions. Moreover, the implementation of European provisions on return is shaped by Germany’s federal structure, given that the Länder are responsible for the organisation of removals and detention. Administrative practices may vary considerably between the Länder and the individual foreigners authorities, even though there is a uniform European and national legal framework.

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Abbreviations

ABH	Foreigners authority (Ausländerbehörde)
AsylG	Asylum Act
AsylbLG	Asylum Seekers' Benefits Act (Asylbewerberleistungsgesetz)
Asylum Package I	Act on the Acceleration of Asylum Procedures
Asylum Package II	Act on the Introduction of Fast-Track Asylum Procedures
AufenthG	Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act) (Aufenthaltsgesetz)
AVwV AufenthG	General Administrative Regulation to the Residence Act (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz)
AZR	Central Register of Foreigners (Ausländerzentralregister)
BAMF	Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge)
BGH	Federal Court of Justice (Bundesgerichtshof)
BMI	Federal Ministry of the Interior (Bundesministerium des Innern)
BPOL	Federal Police (Bundespolizei)
BPtK	Federal Chamber of Psychotherapists
BVerfG	Federal Constitutional Court (Bundesverfassungsgericht)
EC (EG)	European Community (Europäische Gemeinschaft)
ECHR (EGMR)	European Court of Human Rights (Europäischer Gerichtshof für Menschenrechte)
EMN	European Migration Network
EU	European Union
EuGH	European Court of Justice (Europäischer Gerichtshof)
f.	following (e.g. page of a document)
ff.	following (e.g. pages of a document)
GÜB	Border crossing certificate (Grenzübertrittsbescheinigung)
IMK Fußnote 45	Permanent Conference of Ministers and Senators for the Interior of the Länder (Ständige Konferenz der Innenminister und -senatoren der Länder)
IOM	International Organization for Migration
COM	European Commission
RD	Return Directive
SGB	Social Code (Sozialgesetzbuch)
SIS	Schengen Information System
Subs.	Subsection
UNHCR	United Nations High Commissioner for Refugees (Hoher Flüchtlingskommissar der Vereinten Nationen)
VwGO	Code of Administrative Court Procedure (Verwaltungsgerichtsordnung)
ZUR	Repatriation Support Centre (Gemeinsames Zentrum zur Unterstützung der Rückkehr)

Annex

Table 11: Persons held in detention 2012–2015 – 1 January to 31 December of each year²

	2012				2013				2014				2015 2			
	Men	Women	< 18 ¹	Total	Men	Women	< 18 ¹	Total	Men	Women	< 18 ¹	Total	Men	Women	< 18 ¹	Total
Baden-Württemberg ¹²	437	17	k.A. ¹⁰	454	508	17	k.A. ¹⁰	525	73	0	0	73	30	1	0	31 ²
Bavaria	1047	59	28	1134	974	55	9	1038	445	44	1	490	132	14	0	146 ²
Berlin	298	27	1	326	202	19	0	221	314	34	1	349	146	7	0	153 ²
Brandenburg	296	43	1	340	187	48	0	235	90	12	0	102	19	1	0	20 ²
Bremen	25	2	1	28	12	1	0	13	9	0	0	9	4	0	0	4 ²
Hamburg ¹³	149	0	0	149	116	0	0	116	78	2	0	80	3	0	0	3
Hesse ⁹	503	27	k.A.	530	426	15	k.A.	441	153	9	k.A.	162	50	1	k.A.	51 ²
Mecklenburg-Western Pomerania ³	57	0	3	60	84	0	2	86	12	0	0	12	k.A.	k.A.	k.A.	k.A.
Lower Saxony	265	13	0	278	153	10	0	163	149	9	0	158	93	1	0	94 ²
North Rhine-Westphalia ^{4,5}	1297	111	k.A. ⁹	1408	1096	97	k.A. ⁹	1193	390	34	k.A. ⁹	424	64	1	0	65
Rhineland-Palatinate	112	10	1	123	30	1	0	31	30	1	0	31	16	0	0	16 ²
Saarland	26	3	0	29	7	1	0	8	7	1	0	8	0	1	0	1 ²
Saxony ⁶	195	24	k.A.	219	173	8	k.A.	181	0	0	0	0	0	0	0	0
Saxony-Anhalt ¹⁴	60	3	0	63	60	3	0	63	55	4	0	59	42	0	0	42 ²
Schleswig Holstein ⁷	307	0	7	314	251	0	5	256	97	0	0	97	1 ⁸	0	0	0
Thuringia ¹¹	20	k.A.	k.A.	20	21	k.A.	k.A.	21	3	k.A.	k.A.	3	0	0	0	0 ²
Total	5094	339	42	5475	4300	275	16	4591	1905	150	2	2057	599	27	0	626

- 1 No differentiation between male and female minors; only adults are counted as men and women. In addition, the available figures do not differentiate between unaccompanied and accompanied minors. However, unaccompanied minors are currently not removed from any of the Länder (see Chapter 8.2.2).
- 2 2015: Baden-Württemberg, Berlin, Brandenburg, Bremen, Hesse, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate, Saarland, Saxony-Anhalt and Thuringia: until 31 May 2015. Bavaria: until 23 July 2015.
- 3 Last detention date at Bützow: 25 February 2014. The figures for 2014 only refer to the period up to this date.
- 4 Figures for North Rhine-Westphalia include detainees kept in detention on behalf of other Länder and the Federal Police. These detainees may be included in the figures for other Länder, too.
- 5 Figures for 2015 only refer to the period from 15 May 2015 until 30 June 2015 and to the specialised detention facility at Büren. Between the shutdown of the prison at Büren on 25 July 2014 and the opening of the specialised detention facility on 15 May 2015, 165 detainees were accommodated in other Länder.
- 6 The figures for Saxony refer to 31 December 2012 and 31 December 2013, respectively. Detention has not been executed in Saxony since January 2014.
- 7 The figures for Schleswig-Holstein include the number of detainees in the specialised detention facility at Rendsburg, which, until 1 November 2014, only held male detainees older than 16, and Dublin cases. For the latter, the figures differ by 10 persons (for 2012) and 2 persons (for 2013) in the Bundestag document quoted above; the differences are not explained.
- 8 Person accommodated at Eisenhüttenstadt (Brandenburg).
- 9 Minors are not captured separately, but included in the figures for male and female adults.
- 10 The figures for Baden-Württemberg were not broken down by age groups in 2012 and 2013. Any detained minors are therefore included in the figures for male and female adults.
- 11 Thuringia stopped the execution of detention as of 17 July 2014; since then, any detainees are accommodated at Eisenhüttenstadt (Brandenburg). The figures only refer to detentions in Thuringia before 17 July 2014.
- 12 Until July 2014, male detainees were accommodated at a specialised detention facility on the grounds of the prison at Mannheim in Baden-Württemberg. Since November 2013, detention to secure removal has been executed at the central Land detention facility for asylum seekers and persons obliged to leave the country (CEFAA) at Ingelheim (Rhineland-Palatinate) and in rare exceptions at specialised detention facilities in North Rhine-Westphalia and Bavaria. The figures cover detainees at regular prisons and at specialised detention facilities. The statistics for detainees awaiting removal at the regular prison are based on the number of detainees removed or released during the year from regular prisons in Baden-Württemberg.
- 13 Figures for the period until 24 July 2014 refer only to male adult detainees awaiting removal in Hamburg. Women were accommodated at Eisenhüttenstadt (Brandenburg) during this period.
- 14 No figures on Dublin cases for 2012.

Source: Deutscher Bundestag 2016b: 10 et seq.

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